CLERK'S COPY. 2910

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 348

THE FREEPORT WATER COMPANY, PLAINTIFF IN ERROR,

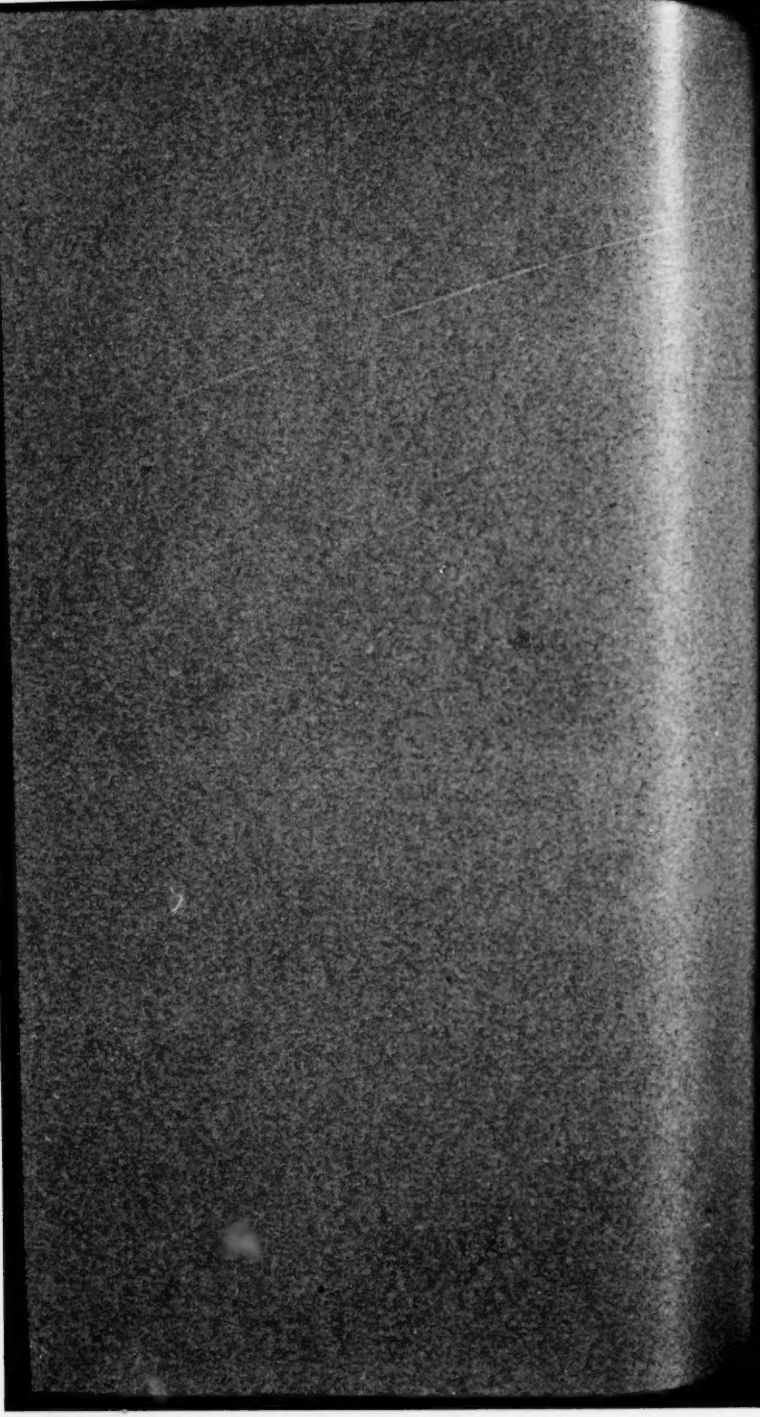
vs.

THE CITY OF FREEPORT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JULY 18, 1900.

(17,833.)



# (17,833.)

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1900.

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THE FREEPORT WATER COMPANY, PLAINTIFF IN ERROR,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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a UNITED STATES OF AMERICA, *ss:*

To City of Freeport, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein The Freeport Water Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Carroll C. Boggs, chief justice of the supreme court of the State of Illinois, this 3rd day of July, in the year of our Lord one thousand nine hundred.

CARROLL C. BOGGS,
*Chief Justice of the Supreme Court of the State of Illinois.*

b STATE OF ILLINOIS, } *ss:*
*Stephenson County,* }

On this ninth day of July, in the year of our Lord one thousand nine hundred, personally appeared Robert P. Eckert before me, the subscriber, a notary public, duly commissioned and sworn, for and in said county, in the State aforesaid, and makes oath that he delivered a true copy of the within citation, on this 9th day of July, A. D. 1900, to Douglas Pattison, corporation counsel of The City of Freeport, defendant in error herein, as one of the attorneys of record for said defendant in error herein in said cause in the supreme court of the State of Illinois; that he delivered a true copy of the within citation, on this 9th day of July, A. D. 1900, to R. B. Mitchell, city attorney of the said City of Freeport, as one of the attorneys of record for said City of Freeport, defendant in error herein in said cause in the supreme court of the State of Illinois; that both said Pattison and said Mitchell are attorneys of record in said cause in the supreme court of the State of Illinois.

ROBERT P. ECKERT.

Sworn to and subscribed the 9th day of July, A. D. 1900.

[Notarial Seal of Oscar E. Heard, Stephenson County, Illinois.]

O. E. HEARD,
*Notary Public in and for Stephenson County, Illinois.*

*Certificate of Magistracy.*

STATE OF ILLINOIS, } *ss:*
*Stephenson County,* }

I, F. C. Held, clerk of the county court in and for said county, do hereby certify that O. E. Heard, Esq., whose name appears to be subscribed to the jurat of the annexed instrument in writing, was

at the date of the execution thereof a notary public in said county, duly commissioned, sworn, and acting as such, and duly authorized to administer oaths, and, further, that I am well acquainted with his handwriting and verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Freeport, in said county, this 9th day of July, A. D. 1900.

[Seal County Court, Stephenson Co., Ill.]

F. C. HELD, *Clerk*,
By W. H. FALL,
*Deputy Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 7, 9, 1900. W. H. F.]

*c* In the Supreme Court of Illinois.

THE FREEPORT WATER CO.
*vs.*
THE CITY OF FREEPORT. } 1261. Appeal from Stephenson.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the ninth day of July, in the year of our Lord one thousand nine hundred, a copy of the foregoing citation was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said court this 9th day of July, A. D. 1900.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
*Clerk of Supreme Court.*

[Two-cent U. S. internal-revenue stamp, canceled Jul- 9, 1900. C. M.]
[Two-cent U. S. internal-revenue stamp, canceled Jul- 9, 1900. C. M.]
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*d* UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Illinois, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Freeport Water Company, the appellant therein, and The City of Freeport, the appellee therein, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their

validity, or wherein was drawn in question the construction
e of a clause of the Constitution or of a treaty or statute of or
commission held under the United States and the decision
was against the title, right, privilege, or exemption specially set up
or claimed under such clause of the said Constitution, treaty, statute,
or commission, a manifest error hath happened, to the great dam-
age of the said Freeport Water Company, as by its complaint ap-
pears, we, being willing that error, if any hath been, should be duly
corrected and full and speedy justice done to the parties aforesaid in
this behalf, do command you, if judgment be therein given, that
then, under your seal, distinctly and openly, you send the record and
proceedings aforesaid, with all things concerning the same, to the
Supreme Court of the United States, together with this writ, so that
you have the same in the said Supreme Court, at Washington,
within 26 days from the date hereof, that, the record and proceed-
ings aforesaid being inspected, the said Supreme Court may cause
further to be done therein to correct that error what of right and
according to the laws and customs of the United States should be
done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of July, in the year of our Lord one thousand nine hundred.

{ The Seal of the Circuit Court of the United States for the South'n Dist. Ill. }

JAMES T. JONES,
*Clerk of the Circuit Court of the United States for the Southern District of Illinois.*

Allowed by—
CARROLL C. BOGGS,
*Chief Justice of the Supreme Court of the State of Illinois.*

f In the Supreme Court of Illinois.

THE FREEPORT WATER COMPANY
vs.
THE CITY OF FREEPORT. } 1261. Appeal from Stephenson.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the ninth day of July, in the year of our Lord one thousand nine hundred, a copy of the foregoing writ of error for the defendants in error was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said court this 9th day of July, A. D. 1900.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
*Clerk of Supreme Court.*

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*g* In the Supreme Court of Illinois.

THE FREEPORT WATER CO. *vs.* THE CITY OF FREEPORT. } 1261. Appeal from Stephenson.

I, Christopher Mamer, clerk of the supreme court of Illinois, elected for the northern grand division, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one (1) to fifty-five (55), inclusive, contain a true and complete transcript and copy of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including the opinion of the court, as the same remain of record and on file in my said office.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affixed, at Springfield, this 9th day of July, in the year of our Lord one thousand nine hundred.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

CHRISTOPHER MAMER,
*Clerk of Supreme Court.*

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1 At a supreme court begun and held at Springfield on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred, within and for the State of Illinois.

Present: James H. Cartwright, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; Joseph N. Carter, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the sixth day of February, A. D. 1900, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the circuit court of Stephenson county in a certain cause entitled "The Freeport Water Company *vs.* The City of Freeport;" which said transcript is in the words and figures following, viz:

2 UNITED STATES OF AMERICA, } ss:
*State of Illinois, Stephenson County,* }

In the Circuit Court, March Term, A. D. 1896.

Pleas before the Honorable John D. Crabtree, one of the judges of the fifteenth judicial circuit of the State of Illinois and sole presiding judge of the circuit court of Stephenson county, in the State aforesaid, and at a term thereof begun and held at the court-house, in the city of Freeport, in said county, on the first Monday (being the 16th day of March), in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the said United States the one hundred and twentieth.

Present: Honorable John D. Crabtree, judge of the fifteenth judicial circuit of the State of Illinois; W. F. Goddard, clerk; O. E. Heard, State's attorney; E. B. Clingman, sheriff.

Attest: W. F. GODDARD, *Clerk.*

Be it remembered that heretofore, to wit, on the 21st day of August, A. D. 1896, it being in vacation after said March term of said court, there issued out of the clerk's office of said court a people's writ of summons; which said writ, together with the return of the sheriff endorsed thereon, is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
*Stephenson County,* }

The People of the State of Illinois to the sheriff of said county Greeting:

We command you to summon The City of Freeport, if it be found in your county, personally to be and appear before the circuit court of said county of Stephenson on the first day of
3 the next term thereof, to be holden at the court-house, in the city of Freeport, in said county, on the first Monday in the month of September next, to answer unto The Freeport Water Company in a plea of assumpsit, to the damage of said plaintiff, as it says, in the sum of sixty-five hundred dollars; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness W. F. Goddard, clerk of our said circuit court,
[SEAL.] and the seal of said court, at Freeport, in said county, this 21st day of August, A. D. 1896.

Attest:

W. F. GODDARD, *Clerk,*
By F. R. BICKENBACH, *Deputy.*

*Summons No.* 16491.

THE FREEPORT WATER COMPANY
*vs.*
THE CITY OF FREEPORT.

Served the within on the within-named defendant by reading the same to George H. Tandy, he being city clerk of the within-named The City of Freeport, and at the same time delivering to him a true copy thereof, this 28th day of August.

E. B. CLINGMAN, *Sheriff.*

| | |
|---|---|
| Service | $ .75 |
| Mileage | .10 |
| Return | .10 |

WM. LATHROP AND
H. C. HYDE,
*Plaintiff's Att'y.*

Filed Aug. 29th, 1896.

W. F. GODDARD, *Clerk,*
By F. R. BICKENBACH, *Dep.*

4 And afterwards, to wit, on the 25th day of August, A. D. 1896, the said plaintiff, by its attorneys, filed in said clerk's office its certain declaration, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss:*
*Stephenson County,* }

In the Circuit Court of said Stephenson County, to the September Term, A. D. 1896.

The Freeport Water Company, a corporation duly organized and existing under the laws of this State, located and having its place of business at the city of Freeport, in the county aforesaid, plaintiff in this suit, by H. C. Hyde & William Lathrop, its attorney-, complains against The City of Freeport, a municipal corporation organized and existing under the general act of the State of Illinois aforesaid, entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, and in force July 1st, 1872, and the acts amendatory thereof, defendant in this suit, which has been duly summoned to answer the plaintiff in an action on promises, for that whereas on and prior to June 5th, 1882, said defendant, City of Freeport, was desirous of contracting with one Nathan Shelton and his assigns for the construction and establishment of a systerm of water works for fire protection and for the supply of said city of Freeport and the citizens thereof with good, clear water suitable for domestic and manufacturing purposes.

And the plaintiff avers that said defendant, City of Freeport, being so desirous to secure the construction and establishment of a

system of water works for fire protection and for the supply of the city and the citizens thereof with good and pure water, as aforesaid, afterwards, to wit, on the 6th day of June, 1882, by its ordinance then passed by its city council and approved by its mayor,
5 granted unto said Nathan Shelton or his assigns the exclusive right and privilege, for the term of thirty years from the 1st day of July, 1882, of supplying said city of Freeport and the citizens thereof by a system of water works, to be constructed as in said ordinance prescribed, with good, clear water suitable for domestic and manufacturing purposes, upon the terms and conditions set forth in said ordinance. The said ordinance was afterwards, to wit, on the 6th day of June, 1882, published by order of the city council of said city of Freeport in the corporation newspaper of said city; and afterwards, to wit, on the 7th day of June, 1882, the said Nathan Shelton filed with the city clerk of said city of Freeport his acceptance in writing of the terms and provisions of said ordinance, as required by the thirteenth section thereof, in words and figures following, viz:

"To the city council of the city of Freeport, in the county of Stephenson, State of Illinois:

"I hereby accept the terms and conditions of an ordinance of said city entitled 'An ordinance to provide for a system of water works in the city of Freeport,' passed by the city council of said city June 6th, A. D. 1882, to all intents and for all purposes as by the 13th section of said ordinance I am required to do.

"NATHAN SHELTON.

"Dated Freeport, June 7th, A. D. 1882."

Whereby the said ordinance became and was a valid and binding contract between said defendant, City of Freeport, aforesaid and said Nathan Shelton and his assigns according to the terms and provisions thereof; that said ordinance is in words and figures following, viz:

"An ordinance to provide for a system of water works in the city of Freeport.

"SEC. I. Be it ordained by the city council of the city of
6 Freeport:

"That there is hereby given and granted to Nathan Shelton or his assigns the exclusive right and privilege for the term of thirty years from the 1st day of July, 1882, of supplying the city of Freeport in the county of Stephenson and State of Illinois and the citizens thereof by a system of water works with good clear water suitable for domestic and manufacturing purposes subject to the terms and conditions set forth in this ordinance. The source of supply of such water shall be the Pecatonica river above where any sewerage or filth from Freeport enters the river all said water shall be filtered.

"SEC. 2. That said Nathan Shelton or his assigns is hereby au

thorized to establish, construct, maintain and operate said works in or adjacent to said city of Freeport; to receive, take and store, purify conduct and distribute said water through said city; to construct and extend aqueducts and pipes through all the streets alleys lanes or public grounds and across any bridge or stream in said city, to erect and maintain engines machinery and other appliances necessary for the proper conducting of said works and for supplying said city and the inhabitants thereof with water of the character described in section one of this ordinance and for that purpose to take up all pavements or sidewalks on such streets alleys lanes or public grounds and make such excavations therein as may be necessary to lay, repair, keep and maintain aqueducts and pipes below the surface of the ground, for conveying and distributing said water as aforesaid. Provided that said Nathan Shelton, or his assigns shall within a reasonable time replace and repair all pavements and sidewalks and refill all such excavations in as good condition as they were before as near as may be.

"And provided further, that in removing such pavements
7 or sidewalks and making such excavations the said Nathan Shelton or his assigns shall suitably guard and protect the same so as to prevent injury to persons or property by reason thereof. And the said Nathan Shelton or his assigns shall be liable for all damages occasioned by a failure so to guard and protect persons and property from injury by reason of the removal of such pavements or sidewalks, or the making of such excavations as aforesaid, whether done by themselves, their lessees, contractors, or subcontractors in any degree. The rights and liabilities provided for in this ordinance shall continue for a period of thirty years, unless sooner extinguished by purchase as hereinafter provided.

"SEC. III. Any person or persons engaged in removing any pavement or sidewalk or in making any excavation within said city pursuant to the provisions of this ordinance, who shall fail to properly guard and protect the same, upon conviction thereof shall be liable to a fine of not less than five dollars nor more than twenty dollars.

"SEC. IV. The said water works shall be constructed with a stand-pipe and the pumping machinery of said water works shall have an easy aggregate capacity to pump at least three million gallons of water in twenty-four hours, and they shall be increased as the growth of the city and its needs require. There shall not be less than eight miles of mains for the distribution of water in said city ranging in size from sixteen inches or over, in their inner diameter, to four inches in their inner diameter and in any event to be of sufficient size to furnish all the water necessary for the purposes contemplated in this ordinance. All mains shall be of what is known as the standard-weight water pipe and they shall all be tested at the foundry where they are made to a pressure of three
hundred pounds to the inch, and when under such pressure
8 they shall be struck with a four-pound hammer. Before the placing of water mains or pipes upon a street of said city not having an established grade, the grade of said street shall be estab-

ished. Said mains shall be located so as to allow of and render easible of placing on them at least eighty fire-hydrants. Such ydrants shall be placed at such points as the city council shall irect.

"SEC. V. Any person or persons who shall wilfully or maliciously njure or destroy any portion of the works, fixtures or other property ppertaining or pertaining to said water works within said city or hall wrongfully interfere with, or open any hydrants within said ity or waste any water therefrom shall be deemed guilty of a mis-demeanor, and on conviction thereof shall be liable to a fine of not ess than three dollars nor more than twenty dollars.

"SEC. VI. The city of Freeport reserves to itself the right to acquire by purchase and become the sole owner of said water works including all machinery mains, pipes buildings and property thereto appertaining at the expiration of thirty years from the first day of July, 1882, by giving at least six months' official notice thereof to the owner or owners of said water works, upon paying therefor to the owners thereof the value of said property to be ascertained by appraisement as follows: Said city shall select one competent person and the owner or owners of said water works shall select another, and the two persons so selected shall select a third, or in case they cannot agree on such third person, a third person shall be appointed by the judge of the circuit court of the thirteenth judicial circuit of the State of Illinois residing at that time furthest from said city of Freeport and the three men so determined upon shall appraise the value of said property at its then cash value, which appraisement shall be binding upon both parties as to
9 the value thereof and said city shall have the right to purchase and become the absolute owner of said water works and property at such appraised value and in case said city does not purchase and become the owner of said water works and property as aforesaid at the expiration of thirty years from the first day of July, 1882, then all the rights and privileges in this ordinance granted to said Nathan Shelton or his assigns shall be extended for a further period of twenty-five years, subject to the rights of the city to purchase as aforesaid, and subject to the same duties liabilities obligations and penalties as herein provided for.

"SEC. VII. The said Nathan Shelton or his assigns shall erect double-nozzle fire-hydrants upon all mains ordered laid by said city council in said city at the rate of not less than ten to each mile of said mains and shall erect said fire-hydrants whenever and wherever said city council shall direct. And said city shall pay to said Nathan Shelton or his assigns as an annual rental for the first one hundred of said hydrants the sum of one hundred dollars each, for all said hydrants over one hundred and up to one hundred and fifty an annual rental of eighty dollars each, and for all of said hydrants over one hundred and fifty an annual rental of fifty dollars each, which said rentals shall be payable semi-annually on the fifteenth days of January and July in each year, and the pay of each hydrant shall commence when each hydrant is actually ready for use and the city officially notified thereof and shall continue during

the full term specified in this ordinance unless said city shall sooner become the owner of said water works as hereinbefore provided in which event said rental shall cease. The pay of any hydrant shall cease whenever any hydrant is out of repair or unfit for use or incapable of throwing a stream as provided for in this ordinance.

"SEC. VIII. The said water works when constructed shall
10 have the capacity of discharging six streams through one-inch nozzles from any six hydrants through fifty feet of two-and-one-half hose to a height of one hundred feet or to maintain its equivalent in pressure at the nozzle of said hydrants at all times or for any lenght of time consecutively. The city shall have five days after the completion of said works in which to test the capacity thereof before accepting the same. And due notice of the completion of said works shall be given by the said Nathan Shelton or his assigns in writing to the city clerk of said city. In case of a fire-alarm at the engine-house of said water works the said Nathan Shelton or his assigns shall immediately cause a sufficient pressure to produce the six streams aforesaid so long as needed for the extinguishing of any fire.

"SEC. IX. The city shall have the right to use, free of charge water from the hydrants on streets curbed and guttered for the purpose of washing and flushing the gutters and from any hydrant for the purpose of flushing any and all sewers in said city whenever the city council shall deem it necessary, for sanitary purposes, upon giving notice to the person in charge of said water works. The city shall have water free of charge for the use of the fire department, and for furnishing the city hall and the offices occupied for city purposes, for all public schools of the city, for all churches and for four public fountains for drinking only and one fountain in the public square or park should the city erect the same.

"SEC. X. The rates to consumers shall not exceed the following annual rates.

| | | |
|---|---|---|
| " Dwelling-houses not exceeding five rooms | | $7.00 |
| " Each additional room | | .75 |
| " Banks including one wash-basin | | 10.00 |
| " Bakeries average daily use for each bl. flour | | 3.50 |
| 11 " Barber shops one chair | | 5.00 |
| " " each additional chair | | 2.50 |
| " Bath-houses public per tub | $7.00 to | 15.00 |
| " " rooms private " | | 3.50 |
| " " " each additional | | 2.00 |
| " Blacksmith shop one fire | | 4.00 |
| " " " each additional fire | | 1.50 |
| " Butcher stalls and shops | $4.00 to | 10.00 |
| " Billiard saloons one table | | 5.00 |
| " " " each additional " | | 1.50 |
| " Book-bindery | $10.00 to | 15.00 |
| " Bars and drinking saloons | 10.00 | 40.00 |
| " Candy factories | 8.00 | 50.00 |

| | | |
|---|---|---|
| "Cigar manufactory five hands or under | | 5.00 |
| " " " each additional hand | | 1.00 |
| "Dray teams and street-railway horses including washing of drays, wagons & cars each horse | | 2.00 |
| "Dyeing & scouring including laundries | $15.00 to | 40.00 |
| "Eating saloons | 10.00 to | 30.00 |
| "Fountains flowing not exceeding 6 hours per day during the season May to November | | 5.00 |
| "$\frac{1}{8}$-inch orifice | | 12.00 |
| "$\frac{3}{16}$ " " | | 25.00 |
| "$\frac{1}{4}$ " " | | 45.00 |
| "$\frac{5}{16}$ " " | | |
| "Filling private cisterns, furnishing water only, each time per 100 bbls. or under | | 1.00 |
| "Hotels and boarding-houses per room | | 1.00 |
| "Street sprinkling by hose including washing and sprinkling sidewalks 20-ft. front or less | | 5.00 |
| 12 "Each additional foot | | .10 |
| "Sprinkling lawns per 1,000 sq. feet no charge less than $5.00 | | 5.00 |
| "Each additional 1,000 ft | | 1.00 |
| "Livery and other public stables including washing of carriages each horse | | 2.50 |
| "Offices and sleeping-rooms including one wash-basin | $3.00 to | 10.00 |
| "Printing offices according to the number of presses and persons not including steam-engines | $6.00 to | 40.00 |
| "Private stables including washing carriages one horse | | 3.00 |
| " " " " " " two horses | | 5.00 |
| "Each additional horse | | 1.00 |
| "Each cow | | 1.50 |
| "Public halls | $5.00 to | 25.00 |
| "Photograph galleries | 10.00 to | 25.00 |
| "Steam-engines assessed as per nominal horse-power of 10 hours' run | | 2.50 |
| "Street sprinkling per wagon each team employed per day | | .50 |
| "Stores | 5.00 to | 15.00 |
| "Steam boilers for house warming &c. each sq. foot surface (no charge less than $5.00) | | .30 |
| "Tobacco manufactory per hand no charge less than $5.00 | | 1.00 |
| "Urinals with constant flow | | 10.00 |
| " " private | | 3.50 |
| "Wash-basins stationery 1st free all others each | | 1.00 |
| "Water-closets in private houses per bowl | | 2.50 |
| 13 "Water-closets public houses per bowl | | 5.00 |
| "Each additional bowl | | 1.50 |
| "Workshops 10 persons or under | | 5.00 |
| "Each additional person | | .25 |
| "Brick-work : | | |
| "Tempering mortar & wetting brick per M kiln count | | .05 |
| "Tempering mortar only | | .02 |
| "Making mortar | | .02 |

"Stone-work:

| | |
|---|---|
| "Making mortar per perch of 16½ cubic feet..... | .05 |
| "Tempering " " " ..... | .02 |

"Plastering:

| | |
|---|---|
| "Making mortar two-coat work per 100 sq. yds..... | .10 |
| " " " three " " " ..... | .15 |
| "Breweries distilleries rectifiers and malt-houses per 1,000 gallons..... | .15 |

"Rents for all purposes not herein named will be fixed by meter measurement as may be agreed upon between the consumer and the water company not exceeding the following meter rates:

| | |
|---|---|
| "100 to 500 gallons per day at rate of per 1,000..... | .50 |
| "500 to 1,000 " " " " " ..... | .40 |
| "1,000 to 2,000 " " " " " ..... | .35 |
| "2,000 to 3,000 " " " " " ..... | .30 |
| "3,000 to 4,000 " " " " " ..... | .25 |
| "4,000 to 5,000 " " " " " ..... | .20 |
| "Over 5,000 " " " " " ..... | .15 |

"SEC. XI. The said Nathan Shelton or his assigns shall extend mains or pipes along the center or sides of streets where no pipes are laid whenever required to do so provided there shall be
14 an equivalent of two tenants to take water for every 120 feet of pipes so asked to be laid but said city shall not be liable to rent any hydrants unless said hydrants shall be ordered placed by said city for city purposes, but said city shall have the free and unobstructed use of all private hydrants stop-cocks or faucets in said city for the purpose of extinguishing fires free of charge to said city for such purposes.

"SEC. XII. The said Nathan Shelton or his assigns shall commence the erection of said water works within thirty days from July 1st, 1882 (if said construction is not commenced on or before Aug. 1st 1882 then all rights and privileges herein granted shall be null and void at the option of the council) and shall prosecute the same as rapidly as possible and shall complete the same on or before the 1st day of July 1883. If said works are not completed on or before July 1st 1883 then all the rights and franchise- granted in this ordinance shall be null and void unless said city shall by ordinance extend the same or said city shall have the right at its option to take possession of said works upon paying for what has been done at an appraised value.

"SEC. XIII. This ordinance shall become binding as a contract between the City of Freeport, Illinois, and Nathan Shelton or his assigns upon the filing with the city clerk of a written acceptance thereof by Nathan Shelton or his assigns provided the same shall be done within 30 days from the passage and publication of this ordinance and this ordinance when so accepted shall not be altered, amended or changed in any way without the concurrence and con-

sent of both parties thereto and interested therein or their successors or assigns.

"SEC. XIV. And be it further ordained that an ordinance entitled 'An ordinance to provide for a system of water works in the
15 city of Freeport' passed and approved March 9th A. D. 1881, be and the same is hereby repealed and all other ordinances or parts thereof in conflict with this ordinance be and the same are hereby repealed."

And whereas after the passage of said ordinance and the acceptance thereof by said Nathan Shelton, as aforesaid, to wit, on the 8th day of August, 1882, said Nathan Shelton, for a valuable consideration to him moving from said plaintiff, assigned and set over unto the plaintiff all his right and interest in said contract and in all rents, benefits, and advantages to accrue therefrom to him, the said Nathan Shelton, or his assigns, and subject to all the duties and obligations by said ordinance imposed upon said Shelton and his assigns, of which the said defendant, City of Freeport, then had notice.

And the plaintiff further avers that said system of water works was duly constructed and afterwards, to wit, on the 18th day of December, 1882, was accepted by said City of Freeport from the plaintiff as a full compliance with the terms of the contract created by said ordinance and the acceptance thereof, as aforesaid.

And the plaintiff further avers that ever since the said acceptance of said water works, to wit, on the 18th day of December, 1882, it has in all things on its part observed and performed the terms of said contract, and has furnished to the said defendant free of charge water as specified and provided in the ninth clause of said ordinance.

And the plaintiff further avers that it had on and prior to January 1st, 1896, constructed and placed upon the mains of said water works in said city, under order and direction of the city council of said city of Freeport, 121 hydrants in all respects as required by section seven of said ordinance, and that said defendant, City
16 of Freeport, had, on and prior to January 15th, 1896, paid the rentals upon said hydrants so constructed and established, as aforesaid, to January 1st, 1896, pursuant to the stipulations and provisions in section seven of said ordinance in that behalf.

And the plaintiff further avers that there became and was due to it on the 15th day of July, 1896, from the defendant, City of Freeport, for the rent of said hydrants from January 1st, 1896, to July 1st, 1896, the sum of five thousand eight hundred and forty dollars ($5,840.00) pursuant to the terms and provisions in that behalf of said section seven of said ordinance, which sum remains due and wholly unpaid.

The plaintiff further avers that the number of hydrants constructed and placed upon said water mains in said city of Freeport pursuant to the order of said city on and prior to January 1st, 1896, and in proper repair and fit for use and in use by said city from

January 1st, 1896, to July 1st, 1896, was 121, and the rental of the first one hundred of said hydrants from January 1st, 1896, to July 1st, 1896, was fifty dollars ($50.00) per hydrant, amounting to five thousand dollars ($5,000.00); and the rental of the remaining 21 hydrants from said January 1st to July 1st, 1896, was forty dollars ($40.00) per hydrant, amounting to eight hundred forty dollars ($840.00), as provided and stipulated in said section seven of said ordinance; and that said defendant, City of Freeport, neglects and refuses to pay the said rentals upon said hydrants or any part thereof from said January 1st to July 1st, 1896, pursuant to the provisions of the seventh section of said ordinance. By reason whereof the said defendant, to wit, on July 15th, 1896, became and was justly indebted to the plaintiff in said sum of five thousand eight hundred and forty dollars ($5,840.00) for rent of said hydrants from January 1st, 1896, to July 1st, 1896, as aforesaid, and afterwards, to wit, on the 16th day of July, A. D. 1896, to wit, at
17 said county, in consideration of the premises, promised to pay said sum of money to the plaintiff upon request; yet the said defendant, although often requested so to do, has not payed said sum of money or any part thereof to the said plaintiff.

And also for that whereas the said defendant, being an incorporated city organized and existing under and by virtue of the general laws of the State of Illinois for the incorporation of cities and villages theretofore enacted, and desiring and intending to induce one Nathan Shelton, or his assigns, to construct and operate a system of water works in said city and thereby supply the same and the inhabitants thereof with water for the protection against fire and for domestic and manufacturing purposes, heretofore, to wit, on the 6th day of June, A. D. 1882, to wit, at said county of Stephenson, by its city council, passed a certain other ordinance entitled "An ordinance to provide for a system of water works in the city of Freeport," which ordinance was on the day and year last aforesaid duly approved by its mayor, and afterwards, to wit, on the same day and year last mentioned, duly published, and a true copy of which said ordinance is set out in words and figures in the first count of this the said plaintiff's declaration; and the plaintiff says that afterwards, and within thirty days from the passage and publication of said ordinance, as aforesaid, to wit, on the 7th day of June, A. D. 1882, to wit, at said county, the said Nathan Shelton in said ordinance mentioned filed with the city clerk of said defendant city his acceptance of said ordinance in a writing by him duly signed, a true copy of which said acceptance is also set out in said first count of said plaintiff's declaration; and the plaintiff further says that thereupon, by said ordinance and acceptance thereof, the same became and was a valid and binding contract between the
18 said defendant and said Nathan Shelton and his assigns, according to the terms thereof; and the plaintiff further says that in and by said contract the said defendant, in consideration that the said Nathan Shelton and his assigns thereby agreed to construct and operate said water works in said city, to erect double-nozzle fire-hydrants upon all water mains ordered laid in said city

by its city council whenever and wherever the said city council should direct, and supply the same with water for the use of said defendant, and supply the inhabitants of said city with water, as in said ordinance provided, then and there undertook and faithfully promised the said Nathan Shelton to pay him or his assigns each half year, on the 15th days of January and July in each year, a rental of fifty dollars for each of the first one hundred of said hydrants, and of forty dollars for each of said hydrants over one hundred and up to one hundred and fifty, and of twenty-five dollars for each of said hydrants over one hundred and fifty, from and after the time the same was actually ready for the use of the said defendant and it was officially notified thereof; and the plaintiff further says that the said Nathan Shelton commenced the construction of said water works, under and pursuant to said contract, before the first day of August, A. D. 1882, and continued the same up to the 8th day of August, A. D. 1882, on which last-named day and year he assigned and transferred to the plaintiff for a valuable consideration all his rights under said contract and all his interest therein, as well as all his rights, privileges, and franchises by said ordinance granted and so much of said water works as he had then constructed; of which assignment the said defendant then and there had notice.

And the plaintiff further says that thereupon it continued the construction of said water works in said city and completed
19 the same prior to the 1st day of July, A. D. 1883, to wit, on the 18th day of December, A. D. 1882, and that on said last-mentioned day and year the said defendant duly accepted the same from the said plaintiff as and in full compliance with the terms of said ordinance in that behalf.

And the plaintiff further says that said defendant paid to the said plaintiff each half year, on the 15th days of January and July in each year, all the rentals which had accrued to it under and pursuant to the terms of said contract, as aforesaid, for fire-hydrants erected by the plaintiff for the defendant's use, under and in accordance with the terms of said ordinance, up to the 1st day of January, A. D. 1896; and the plaintiff further says that pursuant to and under the direction of said city council it had erected, prior to the first day of January, A. D. 1896, upon its water mains in said city one hundred and twenty-one double-nozzle fire-hydrants, actually ready for the use of said defendant, and had officially notified the said defendant thereof prior to said last-mentioned day and year, and from thence hitherto has continued to furnish water to said defendant through said hydrants, as by said contract required, and that during all that time the said defendant was and still is in the full possession of said hydrants, and had and still has the full use of said water so, as aforesaid, furnished by the said plaintiff.

And the plaintiff further says that there was due to it from the said defendant, under and pursuant to the terms of said contract, on the 15th day of July, A. D. 1896, for the half year's rentals of said hydrants from the first day of January, A. D. 1896, up to the 1st day of July, A. D. 1896, the sum of five thousand eight hundred and forty dollars, which sum the said defendant afterwards, to wit,

on the 16th day of July, A. D. 1896, to wit, at said county,
20 promised the said plaintiff to pay to it upon request; yet the said defendant, although often requested so to do, has wholly failed and neglected hitherto to pay said sum or any part thereof to the said plaintiff.

And for that whereas also the said defendant, on the first day of August, in the year of our Lord A. D. 1896, to wit, at said county, was justly indebted to the plaintiff in the sum of five thousand eight hundred and forty dollars for the rental of one hundred and twenty-one water hydrants from the first day of January, A. D. 1896, to the first day of July, A. D. 1896, pursuant to the contract of said defendant in that behalf; and in the sum of five thousand eight hundred and forty dollars for the price and value of work performed and material furnished by the plaintiff for the defendant at its request.

And in the sum of five thousand eight hundred and forty dollars for money then and there received by the defendant for the use of the plaintiff; and in the sum of five thousand eight hundred and forty dollars for so much money then and there found due from the said defendant to the said plaintiff upon an account then and there stated between them; and, being so indebted to the said plaintiff, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there promised the plaintiff well and truly to pay unto the plaintiff the said last-mentioned sum of money upon request of the said plaintiff; yet the said defendant, although often requested so to do, has hitherto altogether disregarded its said promise and has not paid — several sums of money or any or either of them or any part thereof to the said plaintiff, to the damage of the said plaintiff six thousand five hundred dollars; and therefore the said plaintiff brings suit, etc.

WM. LATHROP,
H. C. HYDE,
*Pl'ff's Att'ys.*

21 And afterwards, to wit, on the 14th day of September, A. D. 1896, the said defendant, by its attorneys, filed in said court and cause its plea of the general issue and its four special pleas to the plaintiff's said declaration.

And afterwards, to wit, on the 8th day of October, A. D. 1896, the said plaintiff, by its attorneys, filed in said court and cause its replication to the defendant's said plea of the general issue and its demurrer to the defendant's said four special pleas; which said replication and demurrer is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
*Stephenson County,* }

In Circuit Court, to September Term, 1896.

FREEPORT WATER COMPANY }
*vs.*
CITY OF FREEPORT. }

And the said plaintiff, by Hyde and Lathrop, its attorneys, comes, etc., and, as to the plea of said defendant first above pleaded, wherein defendant puts itself upon the country, doth the like.

HENRY C. HYDE AND
WILLIAM LATHROP,
*Pl'ff's Attorneys.*

And the said plaintiff, as to the special pleas of said defendant by it firstly, secondly, thirdly, & fourthly above pleaded, says that the said several pleas and each and every of them, in manner and form as pleaded, and the matters therein contained, are insufficient in law to bar the plaintiff of its aforesaid action against said defendant, and the plaintiff demurs to said pleas and each of them; and for special cause of demurrer to said pleas and each of them said plaintiff says that said pleas and every of them only set up matters
22 which may be given under the general issue, if admissible in evidence at all, and that said pleas and each of them are in other respects informal and insufficient, and that the plaintiff is not bound to answer the same; and this the plaintiff is ready to verify. Wherefore the plaintiff prays judgment, etc.

HENRY C. HYDE &
WM. LATHROP,
*Att'ys for Pl'ff.*

UNITED STATES OF AMERICA:

STATE OF ILLINOIS, } ss:
*Stephenson County,* }

In the Circuit Court of said County, of the March Term, A. D. 1897.

Pleas before the Honorable James Shaw, one of the judges of the 15th judicial circuit of the State of Illinois and sole presiding judge of said Stephenson county circuit court, and at a term thereof begun and held at the court-house, in the city of Freeport, in said county, on the 15th day of March, A. D. 1897, and in the one hundred and twenty-first year of the Independence of the United States.

Present: The Hon. James Shaw, judge of said court; H. W. Bolender, clerk; O. E. Heard, State's attorney; E. B. Clingman, sheriff.

Attest: H. W. BOLENDER, *Clerk.*

Be it further remembered that on the 29th day of March, A. D. 1897, the same being one of the days of said March term, A. D. 1897, of said court, the following proceedings were had and entered of record in said court, to wit:

THE FREEPORT WATER COMPANY
*vs.*
THE CITY OF FREEPORT. } Assumpsit.

And now, on this day, come the parties hereto, by their re-
23 spective attorneys, and the said defendant now here asks leave of the court to withdraw its plea of the general issue and its third and fourth special pleas, which leave is given by the court; and the said defendant now here also asks leave to amend its first and second special pleas, which leave is given by the court; whereupon the defendant files its amended special pleas, and the plaintiff's demurrer is extended to such amended pleas, and this cause is taken under advisement by the court and continued to the next term for final disposition.

Which said amended first and second special pleas so filed by the said defendant are in the words and figures following, to wit:

No. 1. And for a further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because defendant says that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action, and that at the time of the enacting of the said ordinance in that count mentioned, to wit, on the 6th day of June, 1882, the defendant was a municipal corporation organized under the general law of the State of Illinois for the incorporation of cities and villages, and in its legislative capacity and in pursuance of the then existing statutes of said State relating to "water works" the then city council of said city of Freeport caused to be enacted the said ordinance, and that the said Nathan Shelton in the said ordinance mentioned accepted the provisions thereof.

But the defendant avers that the rates for the water hydrants therein mentioned and for water service to individuals of said municipality, as fixed and established in and by the said ordinance, were then unjust, unreasonable, and oppressive to the citizens and tax-payers of said city, and so remained and continued to be
24 unjust, unreasonable, and oppressive from the said enactment thereof up and until the subsequent action of the council of said city had in relation thereto, as hereinafter stated.

And the defendant further avers that on, to wit, the 10th day of February, 1896, within the said city of Freeport, the said ordinance then being in force and effect and the rates for water so fixed thereby remaining and then and there being unjust, unreasonable, and oppressive, as aforesaid, the city council of said city of Freeport, by an ordinance then and there enacted by said city council and approved by its mayor, readjusted and fixed such water rates so as to make the

ame just, reasonable, and fair; that the said last-mentioned ordiance was afterwards, to wit, on the 11th day of February, 1896, uly published by the order of the said city council of said city in he corporation newspapers of said city, whereby the said last-menioned ordinance then became and was a legal and valid enactment f said municipality and in force according to the terms and proisions thereof. Said ordinance is in words and figures following:

An ordinance to fix and regulate water rates and the prices and charges for water furnished, and for the use of water meters furnished to the city of Freeport, Illinois, and its inhabitants.

Be it ordained by the city council of the city of Freeport:

SECTION I. That the Freeport Water Company, a corporation, now furnishing to the city of Freeport and its inhabitants, water for fire protection, domestic uses and manufacturing purposes and other uses and purposes, shall be entitled to charge and receive therefor, and for the use of water meters, the rates and prices hereinafter fixed and no more.

*Fire Protection and Public Uses.*

SECTION II. Said corporation shall be entitled to charge and receive from the city of Freeport for all water furnished for fire protection and other public uses and purposes as hereinafter defined and enumerated an annual rental or rate of fifty dollars ($50.00) for each double-nozzle fire-hydrants now in use in said city of Freeport, or any that may be ordered hereafter by the city council of the city of Freeport, such rental to be payable in semi-annual installments on the fifteenth (15th) day of January and July, provided that it shall be shown by a certificate signed by the committee on water, city engineer, and chief of fire department that test of the works of said corporation has been made within six (6) months, and that such works have been in such condition as to furnish at all times and for any length of time a fire pressure sufficient to throw six (6) fire streams from six (6) hydrants chosen by the committee on water, each through fifty (50) feet of two and one-half-inch hose and one-inch nozzle from each hydrant so chosen to a height of one hundred (100) feet, or maintain its equivalent in pressure at the nozzles of the hydrants. Where the work- of said corporation are not shown to be maintained in condition to furnish such fire pressure the rental shall be one-half the amount hereinbefore fixed. The above rate and rental shall be in full payment for all water furnished as follows: For fire protection including the furnishing and setting of fire-hydrants for all water used by the fire department in extinguishing fires and in practice, for all water used by the committee on water for cleaning, washing, flushing gutters and sewers, in said city, and for all water used for the city hall, fire and police stations, and other city offices, for drinking fountain in park when desired, and for all public schools and churches in the city.

*Domestic and Other Uses, Without Meter.*

SECTION 3. Said corporation shall be entitled to charge and
26 receive for water furnished for domestic uses, manufacturing purposes, and other uses and purposes, where such water is furnished without meter, the following rates, which shall be in full, for water furnished and for turning on and turning off water:

*Assessment Rates.*

| | |
|---|---|
| Banks, one faucet | $8.00 per year. |
| Bakeries, daily average barrels of flour used per barrel | 3.25 " |
| Barber shop, one chair | 4.50 " |
| Barber shop, each additional chair | 1.50 " |
| Baths private, one tub | 3.00 " |
| Baths private, each additional tub | 1.50 " |
| Baths private, additional for water-closet & urinal. | 2.00 per year. |
| Baths public, per tub | 7.00 per year. |
| Baths hotel, per tub | 6.00 " |
| Blacksmith shop, one fire | 3.25 " |
| Black- shop, each additional fire | 1.25 " |
| Butcher shop, each stall | 3.00 " |
| Butcher shops | $3.75 to 9.00 " |
| Boarding-houses per room | .75 " |
| Hotels per room | .75 " |
| Offices per wash-basin | 2.75 " |
| Printing offices, not including engines, ten hands or less | 9.00 " |
| Printing offices, each additional hand | .25 " |
| Photograph galleries | $7.00 to 15.00 " |
| Public halls | $5.00 to 20.00 " |
| Residences occupied by one family, 6 rooms or less. | 6.00 per year. |
| Residences each additional rooms up to nine rooms | .75 " |
| Residences additional room over nine rooms | .50 " |

27 Provide- in no case in the rating of residences shall a cellar or cellars be counted as a room or rooms, unless there be a faucet in the cellar or cellars, in that case the cellar or cellars shall be counted as one room only, but a cellar containing living or sleeping rooms, any such room shall be counted as other living or sleeping rooms, and no room in any residence containing fifty square feet or less floor measure shall be counted, neither shall any hall in any residence be counted as a room unless it is a reception hall.

| | |
|---|---|
| Sprinkling streets, yards, &c., 4 hours per day, 50 ft. front | $4.50 per year. |
| Sprinkling streets, yards &c., 4 hours per day, each additional ft. front | .09 per year. |
| Sprinkling streets, yards &c., 4 hours per day, corner lots ½ width of side street per foot | .09 " |
| Saloons, each beer pump | 10.00 " |
| " for use of bar | 5.00 " |
| Stables, only where horses are kept private, one horse, including carriage washing | 2.50 " |
| Stables, each additional horse | 1.00 " |
| Stables, each cow | 1.00 " |
| " dray & team of horses, each horse | 1.00 " |
| " livery boarding and sale including carriage washing per horse | 1.50 " |
| Steam boilers, per horse-power, 12 hours per day | 2.00 " |
| " " " 24 " " | 4.00 " |
| Street sprinkling, per wagon, each team employed per day | .50 " |
| Stores not otherwise enumerated | 5.50 " |
| Workshops, 10 persons or under employed | 4.50 " |
| " each additional person | .20 " |
| Tenement-houses each family 6 rooms or less | 6.00 " |
| " " additional room up to 9 rooms | .75 " |
| 28 Tenement-houses each additional room over 9 rooms | .50 per year. |
| Urinal, private | 2.00 per year. |
| " additional for bath-tub | 2.00 " |
| " public | 5.00 " |
| Wash-basins, stationary, first free, all other ea | .75 " |
| Water-closet, private, with urinal | 2.00 " |
| " " additional for bath-tub | 3.00 " |
| " and urinal | 2.00 " |
| " public hotel, restaurant, stores, &c., ea. | 4.50 " |
| Warehouses | 7.00 per year. |

Rates for other uses to be proportionate to the above according to the water used. Rates for fixtures not enumerated, to be proportionate to foregoing rates.

Minimum rates for premises supplied quarter year, $1.00 per year, $4.00.

The above rates shall be payable in advance between the first and fifteenth days of January and July each year, one-half the above yearly rates being payable each six months.

*Building Purposes.*

| | |
|---|---|
| Brick, wall measure per 1,000 | $ .03½ |
| Stone, per perch | .03½ |
| Plaster, per 100 yards | .08 |

Water for building purposes where brick, stone and plastering are not charged for, at the following rates:

| | |
|---|---|
| Ordinary frame buildings | $2.00 |
| Large " " | 3.00 |
| Ordinary brick building | 5.00 |
| Other buildings and uses, each barrel of lime or cement | .03½ |

No charge less than $1.00.

29 The above rates for building purposes shall be payable on the first day of the month succeeding that for which the water is furnished, and where the use shall cease more than ten days before the end of the month, then such rates shall be payable within ten days after such use shall cease.

*Domestic and Other Uses, with Meter.*

SECTION 4. Said corporation shall be entitled to a charge and receive for water furnished for domestic uses, manufacturing purposes and other uses and purposes where such water is furnished or measured by meter, — the following rates shall be in full for water furnished for rent or use of meter and for turning on and turning off water:

*Meter Rates.*

| | |
|---|---|
| 100 to 500 gallons per day, per 1,000 gallons | $ .32 |
| 500 to 1,000 gallons per day, per 1,000 gallons | .30 |
| 1,000 to 2,000 " " " " | .25 |
| 2,000 to 3,000 " " " " | .20 |
| 3,000 to 4,000 " " " " | .18 |
| 4,000 to 5,000 " " " " | .13 |
| 5,000 to 6,000 " " " " | .10 |
| 6,000 to 10,000 " " " " | .08 |
| Over 10,000 gallons per day, per 1,000 gallons | .06 |
| Minimum charge where water is furnished through meter, per quarter year | 1.25 |
| Per year | 5.00 |

When water is taken by meter, the rates shall be payable monthly on or before the fifteenth (15) day of the month succeeding that for which the water is furnished. Said corporation shall have the right to furnish water and consumers to take water at meter rates, and when meters are required, either by said corporation, or by

30 said consumers, they shall be furnished by said corporation without charge, except the meter rates aforesaid. In all cases such meters shall be subject to supervision, inspection, and condemnation of the committee on water, and when condemned shall be removed and a correct meter substituted at the cost of the corporation operating such water works, and in case of failure to substitute a correct meter within ten (10) days after notice of such condemnation, the rate for the premises supplied shall be no more than the minimum meter rates as herein fixed, until such correct meter is furnished. When any consumer shall in writing apply

for a meter at the office of said corporation with whose pipes his premises are connected and ready for, or offered to be put in readiness for the placing or setting of such meter and shall tender the quarterly meter rate as hereinbefore fixed, it shall be the duty of said corporation to furnish and set such meter within ten days thereafter, and in case of a failure so to do, said corporation shall not be entitled to collect for water furnished for such premises, more than the minimum meter rate, as herein fixed, until such meter is furnished.

SECTION 5. Where the consumer shall neglect or refuse to pay his bill for water furnished within the time herein fixed, said corporation having informed him of the amount thereof, may on ten days' notice, turn off the water for such premises, and shall not be required to turn such water on for said consumer, until such bill is paid.

SECTION 6. Said corporation so operating water works in the city of Freeport shall be subject to the provisions of this ordinance, and said corporation and its officers, agents and employés wilfully charging or collecting for water furnished at a greater rate than is fixed in section three and four hereof, shall be guilty of a misde-
31 meanor and u[illegible] conviction thereof, shall be fined not less than one (1) dolla[illegible] or more than one hundred ($100) dollars and costs of prosecution.

SECTION 7. All ordinances and parts of ordinances inconsistent herewith are hereby repealed.

SECTION 8. This ordinance shall take effect and be in force from and after its passage and publication, provided, that nothing herein shall be construed to abridge the power of the city council to further regulate or fix water rates and charges for the use of water meters.

Passed February 10th, 1896.

Approved February 10th, 1896.

JAMES P. YOUNGER, *Mayor.*

Attest: GEO. H. TANDY, *City Clerk.*

And the defendant further avers that on and since the date of the passage and publication of said last-mentioned ordinance, as aforesaid, the same then was and has since been and now is in full force and effect, and that the water rates and charges as therein fixed and stated are obligatory on the said plaintiff until otherwise determined, as the statute directs.

And the defendant further avers that on and prior to the passage, approval, and publication of said last-mentioned ordinance, to wit, on the 6th day of January, 1896, the said city council of said city of Freeport appointed a committee of its own members to confer with the said plaintiff in relation to mutually thereafter fix reasonable, just, and fair rates for water service to said city and its inhabitants, and then and there notified the said plaintiff that such rates and charges then existing and fixed in the ordinance in said
32 declaration mentioned were unjust and unreasonable, and that the said city, the defendant, would no longer continue

to pay the annual rental for hydrants, or approve the charges and rates so fixed by said original ordinance for water service, and thereupon the said plaintiff refused to treat with said committee, and neglected to reduce or fix such rental and water rates so as to make the same just, reasonable, *nad* fair, and that the said city council of said city did thereafter, as aforesaid, proceed to and enacted the said last-mentioned ordinance, and in and thereby did declare and fix such just and reasonable rents for hydrant service and rates to water consumers, and the defendant says that such rents and charges so fixed and determined upon and contained in said last-mentioned ordinance, both as to city and individuals, are fair, just, and reasonable.

And the defendant further avers that after the enactment of the said last-mentioned ordinance, to wit, on the 10th day of July 1896, the defendant then paid the said plaintiff all sums of money due to the plaintiff from the defendant for water rents and water service as provided for in said original ordinance, according to the rates fixed in and by said original ordinance, to the 11th of February, 1896, and all sums so due since the enactment of said subsequent ordinance, according to the rates and charges therein fixed, to the first day — July, 1896, amounting in all to the sum of thirty-four hundred and eighty-five and $\frac{17}{100}$ dollars, and the defendant avers that the said sum is a full payment and discharge of all sums of money then due and owing from defendant to the plaintiff for rent and water service from the first day of January, 1896, to the first day of July, 1896; and this the defendant is ready to verify. Wherefore defendant prays judgment, etc.

BOTSFORD, WAYNE & BOTSFORD,
*Def't's Att'ys.*

W. N. CRONKRITE,
*Corporation Counsel.*

33 No. 2. And for a further plea in this behalf the defendant says *actio non*, because defendant says that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action, and at the time of the enacting of the said ordinance in that count mentioned, to wit, on the 6th day of June, 1882, the defendant was a municipal corporation organized under the general law relating to the incorporation of cities and villages of the State of Illinois, and in its legislative capacity and in pursuance of the then existing statutes of said State relative to "water works," the city council of the city of Freeport caused to be enacted the said ordinance; that the said Nathan Shelton in said ordinance mentioned accepted the provisions thereof, and that in and by the said ordinance certain rents, charges, and rates were fixed and determined upon between the said Shelton and the defendant for rental of hydrants and water service to individuals, and that thereafter the said city, and such individuals as were supplied with water by said plaintiff, as the assignee of said Shelton, paid to plaintiff the rents, rates, and charges, as fixed and provided

r in said ordinance, to the 11th day of February, 1896; but the
fendant avers that after the enactment of the said ordinance, on, to
it, the first day of July, 1891, by reason of the then conditions and
lations of the said plaintiff company in the furnishing said city and
s inhabitants with water under said ordinance, the rents, rates, and
arges therein and thereby fixed for water service became and were
njust and unreasonable and imposed upon the said city and its in-
abitants unjust and unreasonable burdens, and that thereupon the
city council of the city of Freeport endeavored to agree with the
4 said plaintiff so as to mutually readjust and fix said water rents,
rates, and charges to make the same fair, reasonable, and just,
nd, failing so to do, on, to wit, the 10th day of February, 1896, the
ity council of said city of Freeport then and there, in the exercise of
s legislative wisdom and discretion, contending that the said water
ents, rates, and charges as then in existence and in force and as
ixed in and by said ordinance were unjust and unreasonable, pro-
eeded to and did, on the day and year last aforesaid, by another ordi-
nance, readjust, fix, and declare other just and reasonable rates for
uch water service so as to make the same fair, just, and reasonable,
which said last-mentioned ordinance was then and there enacted
nd approved by the mayor of the city of Freeport, and afterwards,
o wit, on the 11th day of February, 1896, was duly published by
he order of the said city council in the corporation newspapers
published in said city, whereby the said last-mentioned ordinance on
he day and date last aforesaid then became and was a legal and
valid enactment of said municipality, and the water rates, rents,
and charges therein fixed were and are fair, just, and reasonable
and which said last-mentioned ordinance is entitled "An ordinance
to fix and regulate water rates and the prices and charges for water
furnished for the use of water meters furnished at the city of Free-
port, Illinois, and its inhabitants," a true copy of which last-men-
tioned ordinance is set out in the words and figures in defendant's
first amended plea filed herein.

And the defendant further avers that on and since the date of the
last passage and publication of said last-mentioned ordinance, as
aforesaid, the same then and there was, has since been, and now is
in full force and effect, and that the water rates, rents, and charges
as therein fixed and stated are obligatory on the said plaintiff until
otherwise determined as the statute directs.

35 And the defendant further avers that after the enactment
of the said last-mentioned ordinance, to wit, on the 10th day
of July, 1896, the defendant then paid to the said plaintiff all sums
of money due to the plaintiff from the defendant for water rents
and water service provided for in said original ordinance, according
to the rates fixed in and by said original ordinance, to the 11th day
of February, 1896, and all sums so due for water furnished since
the enactment of said last-mentioned ordinance, according to the
rates and charges therein fixed, to the 1st day of July, 1896, amount-
ing in all to the sum of, to wit, $3,700. Wherefore the defendant
says that it does not owe to the plaintiff the said sums of money in
the said declaration claimed or any part or portion thereof; and

this the defendant is ready to verify. Wherefore the defendant prays judgment, etc.

BOTSFORD, WAYNE & BOTSFORD,
*Def'ts Att'ys.*

W. N. CRONKRITE,
*Corporation Counsel.*

UNITED STATES OF AMERICA, }
*State of Illinois, Stephenson County,* } ss:

In the Circuit Court of said County, of the December Term, A. D. 1899.

Pleas before the Hon. James Shaw, one of the judges of the 15th judicial circuit of the State of Illinois and sole presiding judge of the circuit court of said Stephenson county, and at a term thereof begun and held at the court-house, in the city of Freeport, in said county, on the 4th day of December, A. D. 1899, and in the one hundred and twenty-third year of the Independence of the United States.

36 Present: The Hon. James Shaw, judge of said court; H. W. Bolender, clerk; O. E. Heard, State's attorney; J. M. Fox, sheriff.

Attest: H. W. BOLENDER, *Clerk.*

And be it further remembered that on the 11th day of December, A. D. 1899, the same being one of the days of the December term, A. D. 1899, of said court, the following proceedings were had in said court and entered of record therein, to wit:

STATE OF ILLINOIS, }
*Stephenson County,* } ss:

In the Circuit Court of said County, of the December Term, A. D. 1899.

FREEPORT WATER COMPANY }
*vs.*
THE CITY OF FREEPORT. }

And now, on this day, come the parties hereto, by their respective attorneys, and this cause again coming on to be heard upon the demurrer of the plaintiff to the defendant's first and second amended special pleas, which was taken under advisement by the court at the March term, A. D. 1897, of this court, and the court, being now fully advised in the premises, overrules said demurrer as to each of said special pleas; to which ruling of the court the plaintiff now here excepts and elects to stand by its said demurrer, and thereupon the court enters judgment on the said demurrer against the plaintiff and in favor of the defendant, and it is ordered by the court that the said defendant have and recover of and from the
37 said plaintiff its costs of the suit as taxed by the clerk, and that the defendant have execution therefor; to the entry of

which said judgment the plaintiff now here excepts and prays an appeal to the supreme court of the State of Illinois, which is allowed by the court upon the plaintiff filing a bond in the sum of two hundred dollars, with surety to be approved by the clerk, within thirty days from the entering of this order.

JAMES SHAW, *Judge.*

And afterwards, to wit, on the 4th day of January, A. D. 1900, the plaintiff filed in the office of the clerk of said court its appeal bond, which was duly approved by the clerk of said court, executed by itself and O. B. Bidwell, which is in the words and figures following, to wit:

Know all men by these presents that we, the Freeport Water Company of Freeport, Illinois, and O. B. Bidwell, of the county of Stephenson and State of Illinois, are held and firmly bound unto the City of Freeport, Illinois, in the penal sum of two hundred dollars; for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Freeport, Illinois, this 4th day of January, in the year of our Lord one thousand nine hundred.

The condition of the above obligation is such that whereas the said City of Freeport did, on the 11th day of December, one thousand eight hundred and ninety-nine, at a term of the circuit court then being holden within and for the county of Stephenson, in the State of Illinois, obtain a judgment against the above-
38 bounden The Freeport Water Company for the costs, amounting to six & $\frac{95}{100}$ dollars, from which judgment the said Freeport Water Company has prayed for and obtained an appeal to the supreme court of the said State of Illinois: Now, if the said Freeport Water Company shall duly prosecute said appeal and shall, moreover, pay the amount of the said judgment, costs, interest, and damages, rendered and to be rendered, against it, the said Freeport Water Company, in case the said judgment shall be affirmed in the said supreme court, then the above obligation to be null and void; ortherwise to remain in full force and virtue.

[Seal of said Company.]

FREEPORT WATER COMPANY,
By M. STOSKOPF, *Its President.*
O. B. BIDWELL. [L. S.]

Upon which bond is the following endorsement, to wit: "Filed this 4th day of January, A. D. 1900, and approved by me. H. W. Bolender, clerk."

STATE OF ILLINOIS, } ss:
*Stephenson County,* }

I, H. W. Bolender, clerk of the circuit court of Stephenson county, in the State aforesaid, and keeper of the records and files of said court, do hereby certify the above to be a true, perfect, and complete

copy of the sommons and the return thereon, the plaintiff's declaration, the defendant's pleas thereto, the plaintiff's demurrer to said pleas, and the orders and judgment of said court and the plaintiff's appeal bond in a certain cause pending in said court, on the common-law side thereof, wherein The Freeport Water Company is
39 plaintiff and The City of Freeport defendant, as the same appear from the records and files of said court now in my office remaining.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Freeport, this 22nd day of January, A. D. 1900.

[SEAL.] H. W. BOLENDER, *Clerk.*

In the Supreme Court of Illinois, February Term, A. D. 1900.

THE FREEPORT WATER COMPANY, Appellant,
*vs.*
THE CITY OF FREEPORT, Appellee.

And now comes The Freeport Water Company, appellant, by Fry & Hyde, its attorneys, and says that in the record and proceedings aforesaid there is manifest errors in this—that is to say:

1. The circuit court erred in overruling the demurrer of appellant to appellee's amended first and second pleas, and each of them, because the ordinance passed February 10, 1896, set forth in said pleas, is in violation of section 10 of article 1 of the Constitution of the United States of America, which prohibits any State to pass a law impairing the obligation of contracts.

2. The circuit court erred in overruling the demurrer of appellant to appellee's amended first and second pleas, and each of them, because the ordinance passed Februry 10, 1896, set forth in
40 said pleas, is in violation of article 1 of section 14 of the amendments to the Constitution of the United State of America, in that it attempts to deprive appellant of its property without due process of law.

3. The circuit court erred in overruling the demurrer of appellants to appellee's amended first and second pleas, and each of them, because the statutes of the State of Illinois in force February 10, 1896, relating to "water works," in said pleas referred to, are in violation of section 10 of article 1 of the Constitution of the United States of America, which prohibits any State to pass a law impairing the obligation of contracts.

4. The circuit court erred in overruling the demurrer of appellant to appellee's amended first and second pleas, and each of them, because the statutes of the State of Illinois in force February 10, 1896, relating to "water works," in said pleas referred to, are in violation of article 1, section 14, of the amendments to the Constitution of the United States of America, in that it attempts to deprive appellant of its property without due process of law.

5. The circuit court erred in overruling the demurrer of appel-

lant to appellee's amended first and second pleas, and each of them, because the ordinance set forth in said pleas and passed February 10, 1896, under and by virtue of the supposed authority of the then existing statutes of the State of Illinois relating to "water works," referred to in said pleas and relied upon as the defense to said suit,
seeks to impair the contract made and entered into between
41 Nathan Shelton, assignor of appellant, and appellee, created
by the ordinance in appellant's declaration mentioned and the acceptance thereof, and by reason thereof is repugnant to section 10, article 1, of the Constitution of the United States of America, which provides that no State shall pass any law impairing the obligation of contracts.

6. The circuit court erred in overruling the demurrer of appellant to appellee's amended first and second pleas, and each of them, because the ordinance set forth in said pleas and passed February 10, 1896, under and by virtue of an act of legislature of the State of Illinois, entitled "An act to enable cities, towns, and villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by any individual, company, or corporation to any such city, town, or village and the inhabitants thereof," approved June 6, 1891, being the statute of the State of Illinois then in force and referred to in said pleas and relied upon as the defense to said suit, seeks to impair the contract made and entered into between Nathan Shelton, assignor of appellant and appellee, created by the ordinance in appellant's declaration mentioned and the acceptance thereof, and by reason thereof is repugnant to section 10, article 1, of the Constitution of the United States of America, which provides that no State shall pass any law impairing the obligation of contracts.

7. The circuit court erred in overruling appellant's demurrer to appellee's amended first and second pleas, and each of them, for
the reason that the ordinance of February 10, 1896, in said
42 pleas mentioned, passed under the supposed authority of the then existing statutes of the State of Illinois relating to "water works," in said pleas referred to, is in violation of section 1, article 14, of the amendment to the Constitution of the United States of America, which provides that no State shall deprive any person of its property without due process of law.

8. The circuit court erred in overruling appellant's demurrer to appellee's amended first and second pleas, and each of them, for the reason that the ordinance of February 10, 1896, in said pleas mentioned, passed under and by virtue of the supposed authority of an act of legislature of the State of Illinois, entitled "An act to enable cities, towns, and villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town, or village and the inhabitants thereof," approved June 6, 1891, being the statutes of the State of Illinois referred to in said pleas, is in violation of section 1, article 14, of the amendments to the Constitution of the United States of America

which provides that no State shall deprive any person of its property without due process of law.

February 5th, 1900.

FRY & HYDE,
*Attorneys for Appellant.*

43 And afterwards, to wit, on the seventeenth day of February, A. D. 1900, certain proceedings were had in said court and orders entered of record in the words and figures following, viz:

THE FREEPORT WATER COMPANY *vs.* THE CITY OF FREEPORT. } No. 1261. Appeal from Stephenson.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that —— ——, appellant, hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein and entered motion to reverse the judgment and remand said cause and for costs, and the said appelle, —— ——, having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, *and* said cause is here submitted for the consideration and judgment of the court.

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

44 At a supreme court begun and held at Springfield on Tuesday, the fifth day of June, in the year of our Lord one thousand nine hundred, within and for the State of Illinois.

Present: Carroll C. Boggs, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; Joseph N. Carter, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; James H. Cartwright, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to wit, on the twenty-first day of June, A. D. 1900, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

THE FREEPORT WATER COMPANY *v.* THE CITY OF FREEPORT. } No. 1261. Appeal from Stephenson.

And now, on this day, this cause having been argued by counsel and the court having diligently examined and inspected as well

ie record and proceedings aforesaid as the matters and things herein assigned for error, and being now sufficiently advised of nd concerning the premises, for that it appears to the court now ere that neither in the record and proceedings aforesaid nor in the endition of the judgment aforesaid is there anything erroneous, icious, or defective, and that in that record there is no error; herefore it is considered by the court that the judgment aforesaid e affirmed in all things and stand in full force and effect notwithtanding the said matters and things therein assigned for error; nd it is further considered by the court that the said appellee recover of and from the said appellant its costs by it in this behalf expended, and that it have execution therefor.

45 At a supreme court begun and held at Springfield on Tuesday, the fifth day of June, in the year of our Lord one thousand nine hundred, within and for the State of Illinois.

Present: Carroll C. Boggs, chief justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; James H. Cartwright, justice; Jacob W. Wilkin, justice; Joseph N. Carter, justice; John P. Hand, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the twenty-first day of June, 1900, the opinion of the court was filed in the words and figures following, to wit:

FREEPORT WATER CO. *vs.* CITY OF FREEPORT. } No. 1261. Error to —. Appeal from Stephenson.

46 Docket No. 1261. Ag. 36. Northern Div. Feb., 1900.

THE FREEPORT WATER CO. *v.* THE CITY OF FREEPORT.

On the sixth of June, 1882, the city of Freeport, organized under the general law for the incorporation of cities and villages, passed an ordinance granting to one Nathan Shelton or his assigns the exclusive right, for the term of thirty years, of supplying the city and citizens thereof, by a system of water works to be constructed as in said ordinance prescribed, with water, the terms and conditions of which ordinance were accepted by said Shelton on June 7, 1882, and by which the city agreed to pay during the full term of thirty years, to said Shelton or his assigns, an annual rental of $100 per annum for the first one hundred hydrants, and for all hydrants over one hundred and up to one hundred and fifty the sum of $80 per hydrant, and for all hydrants over one hundred and fifty an annual rental of $50 per hydrant, the rentals being payable semi-annually, on the 15th days of January and July of each year. The city is given the free use of water for flushing gutters and sewers, on

notice to the person in charge of the water works, free water for the fire department, for city hall and offices, for public schools and all churches of the city, and for four public fountains for drinking only, and one fountain in the public square, should the city erect the same. On the eighth of August, 1882, Shelton sold and assigned all his rights under this ordinance to the plaintiff, and under it the plaintiff had, on and prior to January 1, 1896, constructed and placed one hundred and twenty-one hydrants, up to which time the city paid all rentals called for by the said ordinance. This suit was brought by the appellant in assumpsit, against the city, to recover the sum of $5,840 alleged to be due it on the 15th day of July, 1896, for hydrant rentals from January 1 to July 1, 1896.

The plaintiff's declaration consisted of two special counts setting out the original ordinance *in hæc verba*, and a third containing the consolidated money counts. The defendant filed two special pleas, by which it was alleged, in substance, that the rates fixed by the Shelton ordinance were and had remained, from the time of its enactment until the subsequent action of the city council, unjust, unreasonable and oppressive; that on the 10th day of Febru-
47 ary, 1896, the said ordinance being then in force and effect, the city council, by an ordinance then and there enacted, approved and published, readjusted and fixed such water rates so as to make the same just, reasonable and fair, and that said ordinance then became and was a legal and valid enactment of the defendant,—which amendatory ordinance is set out *in hæc verba*, and fixes the price for each hydrant at $50 per year, payable semi-annually, on the 15th days of July and January of each year; that since the date of its passage and publication the same has ever since been and now is in force, and that the water rates and charges therein fixed and stated are obligatory on plaintiff and are fair, just and reasonable, and that on the 10th day of July, 1896, the defendant paid to the plaintiff all sums of money due it, as fixed by the original ordinance, up to the 11th day of February, 1896, and all sums of money due plaintiff since the enactment of such subsequent ordinance, according to the rates therein fixed, up to July 1. To these pleas plaintiff demurred. The court overruled the demurrer to the pleas, and, plaintiff electing to stand by its demurrer, judgment was entered against it and in favor of the defendant for costs.

Appellant assigns as error, and insists, that the ordinance of February 10, 1896, and the statute of the State of Illinois on which said amendatory ordinance is based, being the act of June 6, 1891, in force July 1, 1891, are each in violation of section 10 of article 1 of the Constitution of the United States, and of section 1 of article 14 of the amendments to said Constitution, as impairing the obligation of contracts and in depriving appellant of its property without due process of law.

Per *Curiam:*

It appears that the appellant is a corporation organized under the general incorporation law of the State of Illinois. The precise questions presented on this record arose in the cases of City of Danville

Danville Water Co., 178 Ill., 299, and 180 *id.*, 235, where it was
ld that a corporation organized under the general incorporation
t agrees to submit itself to such regulations and provisions as the
gislature may deem it advisable to make, under section 9 of said act,
which the right of the legislature to regulate the rates at which water
shall be supplied to the public by a water company so organ-
3 ized is reserved; that the act of June 6, 1891, empowering
cities to fix reasonable water rates, is constitutional and
alid, notwithstanding the fact that the city had theretofore entered
ito a contract with a private corporation by which the rentals for
ater had been fixed during the period of the franchise; that the
ity has no power, by virtue of the act of April 9, 1872, and section
of article 10 of the city and village act, to bind itself to the pay-
ent of a fixed sum for an entire period of thirty years in advance,
ut that the city might, under the act of June 6, 1891, make a rea-
onable reduction for future supply. The demurrer to the pleas
dmits that the rates for hydrant rentals to be paid to the appellant
nder the amendatory ordinance of February 10 were reasonable
nd just, and the cases just cited must be held conclusive of this
ase.

The judgment of the circuit court of Stephenson county is af-
irmed.

Judgment affirmed.

49 STATE OF ILLINOIS, *ss:*

Supreme Court.

I, Christopher Mamer, elected clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said supreme court in the above-entitled cause of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Springfield, this 2nd day of July, A. D. 1900.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

C. MAMER,
*Clerk of the Supreme Court.*

50 And afterwards, on the seventh day of July, A. D. 1900, there was filed in the office of the clerk of said court a certain petition and order in the words and figures following, viz:

STATE OF ILLINOIS, } ss.:
*County of Cook,* }

In the Supreme Court of Illinois, Vacation After June Term, A. D. 1900.

FREEPORT WATER CO., Appellant, }
*vs.* } Gen. No., 1261.
CITY OF FREEPORT, Appellee. }

To the Honorable Carroll C. Boggs, chief justice of the supreme court of the State of Illinois:

And now comes The Freeport Water Company, appellant in the above-entitled cause, the petitioner, by Fry & Hyde, its attorneys, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment entered in this court in the above-entitled cause on the 21st day of June, A. D. 1900, at the June, A. D. 1900, term thereof, in favor of The City of Freeport, appellee, and against The Freeport Water Company, appellant, there is manifest error.

Your petitioner further shows that it appears by the record now remaining in the supreme court of the State of Illinois that certain rights and privileges were claimed under the Constitution of the United States of America by The Freeport Water Company, appellant; that said supreme court of Illinois erroneously decided against said rights and privileges of The Freeport Water Company, appellant, which were specifically set up and claimed under such Constitution; and, further, that the validity of the authority exercised under the statutes of the said State of Illinois were drawn in question in said suit by said Freeport Water Company,
51 appellant, on the ground that said statutes were repugnant to the Constitution of the United States of America, and the decision of said circuit court of Illinois was in favor of the validity of the authorities so exercised, and the decision of said supreme court of the State of Illinois was adverse to the Freeport Water Company, appellant; from all of which the said Freeport Water Company, appellant, alleges that it appears in and from the said record and proceedings in said suit that manifest error has occurred, to the great damage of said Freeport Water Company, appellant, and that a Federal question is presented upon the record in said cause which should be passed upon by the Supreme Court of the United States of America.

Wherefore the said Freeport Water Company, your petitioner, prays that there be granted unto it, under and pursuant to the act of Congress in such cause made and provided, a writ of error from the Supreme Court of the United States of America to the supreme court of the State of Illinois, so that the said error therein may be corrected and speedy justice done in the premises; and that a citation may be issued herein pursuant to law, citing and admonishing said City of Freeport, appellee, to be and appear at the Supreme Court of the United States, at Washington, according to the usual

urse and practice in such cases, and your petitioner files herewith bond that it will make good its plea or otherwise answer all costs at may be sustained by said City of Freeport, appellee, and prays at such further order and proceedings may be had and entered erein, and such further process granted it herein as may be necesry fully to grant to the Freeport Water Company, appellant, your etitioner, the relief herein prayed for, according to the usual course nd practice in such cases.

And your petitioner will ever pray, etc.

THE FREEPORT WATER CO.,
2 By FRY & HYDE, *Their Attorneys.*

GEO. C. FRY, *Of Counsel.*

JULY 3RD, 1900.

Upon consideration of the allegations of the foregoing petition, it s ordered that a writ of error be, and it is hereby, allowed, as prayed n said petition, on filing of the bond hereto attached.

CARROLL C. BOGGS,
*Chief Justice Supreme Court of Illinois.*

And afterwards, to wit, on the seventh day of July, A. D. 1900, there was filed a certain bond in the words and figures following, viz:

Know all men by these presents that we, the Freeport Water Company, a corporation organized and existing under the laws of the State of Illinois, as principal, and Orlando B. Bidwell, of Freeport, in the county of Stephenson and State of Illinois, as surety, are held and firmly bound unto the City of Freeport, its successors, attorneys, and assigns, in the sum of five hundred dollars ($500.00); for the payment of which, well and truly to be made, the said Freeport Water Company, for itself, its successors, and assigns, and said Orlando B. Bidwell, for himself, his heirs, executors, and administrators, bind ourselves, jointly and severally, firmly by these presents.

Witness our hands and seals this 29th day of June, A. D. 1900.

The condition of the above obligation is such that whereas in a certain suit lately pending in the supreme court of the State
53 of Illinois, wherein The Freeport Water Company is the appellant and The City of Freeport the appellee, an order and judgment were entered on the 21st day of June, A. D. 1900, affirming the judgment of the circuit court of Stephenson county in a certain suit theretofore pending in said circuit court between the same parties;

And whereas it was further adjudged and decreed by said supreme court that The City of Freeport, the appellee therein, have and recover its costs of and from The Freeport Water Company, appellant;

And whereas, further, the said Freeport Water Company has sued out a writ of error from the Supreme Court of the United States of

America to reverse the said order and judgment of the supreme court of the State of Illinois:

Now, therefore, if the above-bounden Freeport Water Company shall prosecute its said writ of error to effect and answer and pay all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE FREEPORT WATER COMPANY,
[SEAL.] By MICHAEL STOSKOPF, *Its President.*
ORLANDO B. BIDWELL. [SEAL.]

STATE OF ILLINOIS, } ss:
*County of Stephenson,* }

Orlando B. Bidwell, being first duly sworn, on oath deposes and says that he is a citizen of the United States of America and of the State of Illinois and is a resident of the city of Freeport, in said Stephenson county; that he executed the foregoing bond for the uses and purposes therein mentioned, and that he is worth
54 five hundred dollars ($500.00) and upwards, over and above all his debts and liabilities, in property not by law exempt from execution.

And further affiant saith not.

ORLANDO B. BIDWELL.

Subscribed and sworn to before me this 29th day of June, A. D. 1900.

[SEAL.] H. C. HYDE,
*Notary Public.*

The above and foregoing bond is approved by me this 3rd day of July, A. D. 1900.

CARROLL C. BOGGS,
*Chief Justice of the Supreme Court of the State of Illinois.*

STATE OF ILLINOIS, } ss:
*County of Cook,* }

In the Supreme Court of Illinois.

FREEPORT WATER CO., Appellant,
*vs.*
CITY OF FREEPORT, Appellee. } Gen. No., 1261.

To Douglas Pattison, Esq., corporation counsel; Robert B. Mitchell, city attorney for city of Freeport, and R. M. Botsford, of counsel.

GENTLEMEN: Please take notice that on Tuesday, July 3rd, A. D. 1900, we shall present to the Honorable Carroll C. Boggs, chief justice of the supreme court of the State of Illinois, the petition for a writ of error in the above-entitled cause, and for citation, a copy of which is herewith served upon you, and shall at the same time and place present for approval the bond a copy of which is herewith

served upon you, at which time and place you may appear if you see fit.

55 Yours respectfully, FRYE & HYDE,
*Attorneys for Appellant.*

Copy of the above notice, petition, and bond received this 29th day of June, A. D. 1900. Said bond is satisfactory to appellee as to surety.

ROBERT B. MITCHELL,
*City Attorney, Attorney for Appellee.*
DOUGLAS PATTISON,
*Corporation Counsel, Attorney for Appellee.*

56 Supreme Court of the United States, to the October Term, A. D. 1900.

FREEPORT WATER COMPANY, Plaintiff in Error,
*v.*
CITY OF FREEPORT, Defendant in Error.

And now comes The Freeport Water Company, plaintiff in error, by George C. Fry, its attorney, and says: In the record and proceedings aforesaid there is manifest error, in this—that is to say:

(1.) The supreme court of the State of Illinois erred in affirming the judgment of the circuit court of Stephenson county, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas of defendant in error, because the ordinance passed February 10th, 1896, set forth in said pleas, is in violation of section 10 of article 1 of the Constitution of the United States of America, which prohibits any State from passing a law impairing the obligation of contracts.

(2.) The supreme court of the State of Illinois erred in affirming the judgment of the circuit court of Stephenson county, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas of defendant in error, and each of them, because the ordinance passed February 10th, 1896, set forth in said pleas, is in violation of article 1 of section 14 of the amendments to the Constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

(3.) The supreme court of the State of Illinois erred in affirming the judgment of the circuit court of Stephenson county, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas, and each of them, of defendant in error, because the statute of the State of Illinois in force February 10th, 1896, relating to "water works," in said pleas referred to, are in violation of section 10 of article 1 of the Constitution of the United States of America, which prohibits any State from passing a law impairing the obligation of contracts.

57 (4.) The supreme court of the State of Illinois erred in affirming the judgment of the circuit court of Stephenson county, Illinois, overruling the demurrer of plaintiff in error to the

amended first and second pleas, and each of them, of defendant in error, because the statutes of the State of Illinois in force February 10th, 1896, relating to "water works," in said pleas referred to, are in violation of article 1 of section 14 of the amendments of the Constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

(5.) The supreme court of the State of Illinois erred in affirming the judgment of the circuit court of Stephenson county, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas, and each of them, of defendant in error, because the ordinance set forth in said pleas and passed February 10th, 1896, under and by virtue of the supposed authority of the then existing statutes of the State of Illinois relating to "water works," referred to in said pleas and relied upon as the defense to said suit, impairs the contract made and entered into between Nathan Shelton, assignor of plaintiff in error, and the defendant in error, created by the ordinance in plaintiff in error's declaration mentioned, and the acceptance thereof, and by reason thereof is repugnant to section 10, article 1, of the Constitution of the United States of America, which provides that no State should pass any law impairing the obligation of contracts.

(6.) The supreme court of the State of Illinois erred in affirming the judgment of the circuit court of Stephenson county, Illinois, overruling the demurrer of plaintiff in error to defendant in error's amended first and second pleas, and each of them, because the ordinance set forth in said pleas and passed February 10th, 1896, under and by virtue of an act of the legislature of the State of Illinois entitled "An act to enable cities, towns, and villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by any individual, company, or corporation to any such city, town, or village and the inhabitants thereof," approved June 6th, 1891, being the statute of the State of Illinois then in force and referred to in said pleas and relied upon as a defense to said suit, impairs the contract made and entered into between Nathan Shelton, assignor of plaintiffs
58 in error, and defendants in error, created by the ordinance, and acceptance thereof, set forth in plaintiff in error's declaration, and by reason thereof is in violation of section 10, article 1, of the Constitution of the United States of America, which provides that no State shall pass any law impairing the obligation of contracts.

(7.) The supreme court of the State of Illinois erred in affirming the judgment of the circuit court of Stephenson county, Illinois, overruling plaintiff in error's demurrer to defendant in error's amended first and second pleas, and each of them, for the reason that the ordinance of February 10th, 1896, in said pleas mentioned, and passed under the supposed authority of the then existing statute of the State of Illinois relating to "water works," in said pleas referred to, is in violation of section 1, article 14, of the amendments to the Constitution of the United States of America, which

provides that no State shall deprive any person of its property without due process of law.

(8.) The supreme court of the State of Illinois erred in affirming the judgment of the circuit court of Stephenson county, Illinois, overruling plaintiff in error's demurrer to defendant in error's amended first and second pleas, and each of them, for the reason that the ordinance of February 10th, 1896, in said pleas mentioned, passed under and by virtue of the supposed authority of the legislature of the State of Illinois entitled "An act to enable cities, towns, and villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by any individual, company, or corporation to any such city, town, or village and the inhabitants thereof," approved June 6th, 1891, being the statute of the State of Illinois referred to in said pleas, is in violation of section 1, article 14, of the amendments to the Constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

(9.) The supreme court of the State of Illinois erred in entering the judgment in favor of the defendant in error and against the plaintiff in error on the 21st day of June, A. D. 1900, in said cause, because the ordinance of defendant in error of February 10th, 1896,

and the statute of the State of Illinois on which said ordi-

59 nance is based, being an act of the legislature of the State of Illinois passed June 6th, 1891, and in force July 1st, 1891, and each of them, are in violation of section 10 of article 1 of the Constitution of the United States of America, in that it impairs the obligation of the contract between Nathan Shelton and the defendant in error set out in the declaration of plaintiff in error herein.

(10.) The supreme court of the State of Illinois erred in entering the judgment in favor of the defendant in error and against the plaintiff in error, on the 21st day of June, A. D. 1900, in said cause, because the ordinance of defendant in error of February 10th, 1896, and the statute of the State of Illinois on which said ordinance is based, being an act of the legislature of the State of Illinois passed June 6th, 1891, and in force July 1st, 1891, and each of them, are in violation of section 1 of article 14 of the amendments to the Constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

And the said Freeport Water Company, plaintiff in error, prays that the judgment aforesaid may be reversed, annulled, and wholly set at naught.

Dated this 12th day of July, A. D. 1900.

GEORGE C. FRY,
*Counsel for Plaintiff in Error.*

60 Supreme Court of the United States, to the October Term, A. D. 1900.

FREEPORT WATER COMPANY, Plaintiff in Error,
*v.*
CITY OF FREEPORT, Defendant in Error.

And now comes The Freeport Water Company, plaintiff in error, by George C. Fry, its attorney, and files herein the writ of error, an authenticated transcript of the record, an assignment of errors, and citation to the adverse party.

And now prays the court that the judgment rendered in the supreme court of the State of Illinois, and in said record shown, may be reversed and wholly set at nought.

Dated this twelfth day of July, A. D. 1900.

GEORGE C. FRY,
*Counsel for Plaintiff in Error.*

61 [Endorsed:] George C. Fry, counsel for plaintiff in error.

Endorsed on cover: File No., 17,833. Illinois supreme court. Term No., 348. The Freeport Water Company, plaintiff in error, *vs.* The City of Freeport. Filed July 16th, 1900.



No. 948.

Motion to advance

Gen. No. 17,833. Term No.

F
OC
JAMES H.

Filed Oct. 29, 1900.

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

FREEPORT WATER COMPANY,
*Plaintiff in Error,*

vs.

CITY OF FREEPORT,
*Defendant in Error.*

Error to the Supreme Court of the State of Illinois.

**MOTION TO ADVANCE AND HAVE CASE HEARD WITH No. 56, OR LEAVE TO FILE ARGUMENTS AS AMICUS CURIÆ IN CAUSE No. 56.**

GEORGE C. FRY and
JAMES W. HYDE,
ATTORNEYS FOR PLAINTIFF IN ERROR.

GEORGE C. FRY,
OF COUNSEL.

The Gunthorp-Warren Printing Company, 42 Madison St., Chicago.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

FREEPORT WATER COMPANY,
*Plaintiff in Error,*

*vs.*

CITY OF FREEPORT,
*Defendant in Error.*

Error to the Supreme Court of the State of Illinois.

Your petitioner, the Freeport Water Company, plaintiff in error in the above entitled cause, by George C. Fry and James W. Hyde, its attorneys and counsel, now comes and makes known to the court that there is pending and undetermined on the docket of this court a certain cause, wherein the Rogers Park Water Company is plaintiff in error and John B. Fergus is defendant in error, being cause bearing Term No. 56 of the October Term, A. D. 1900, of this court.

Your petitioner further shows that there is involved in said last mentioned cause, and there has been assigned errors therein which raise the questions whether or not an ordinance of a municipality passed under the provisions of an act of the legislature of the State of Illinois, passed June 6, A. D. 1891, reducing and establish-

ing water rates to be thereafter charged by a corporation which had prior to the passage of such act entered into contract with such municipality for furnishing such municipality and its inhabitants with a supply of water at a fixed rate is in violation of the provisions of Section 10, Article 1, of the Constitution of the United States of America, and Section 1, Article 14, of the Amendments to the Constitution of the United States of America.

That, by assignment of errors in the above entitled cause, the same questions as are involved and arise in the said cause of *Rogers Park Water Company* v. *Fergus* are involved and arise in the above entitled cause.

That both said causes are brought to this court on a writ of error from the Supreme Court of the State of Illinois to reverse a judgment of said Supreme Court of the State of Illinois involving the construction of said two provisions of the Federal Constitution, and the same questions are involved, arise and are argued in each of said causes.

Your petitioner further shows that it has caused a brief and argument to be prepared by its counsel and filed in this court.

That, according to the usual course of practice, and the rate at which causes have heretofore been reached for call upon the docket of this court, the above entitled cause, being Term No. 348 of this October, A. D. 1900, docket, would probably not be reached for determination of this court until near the close of the present term of court, if reached at all during the present term of this court.

That said cause of *Rogers Park Water Co.* v. *Fergus* is now on the call of cases to be heard on Monday, October 29th, A. D. 1900.

That, while not deprecating the force of the able argument of counsel in the said case of *Rogers Park Water Company* v. *Fergus*, your petitioner believes that this court should have the benefit of the said argument of its counsel in aiding them in the consideration and determination of the questions involved in said suit of *Rogers Park Water Company* v. *Fergus*, which aid and assistance this court will not have should the court not consider the argument of the counsel of plaintiff in error.

Wherefore, your petitioner prays:

(1) That the above entitled cause may be advanced on the call of the docket so as to be heard before final decision is rendered in the said suit of *Rogers Park Water Company* v. *Fergus;*

(2) Or, that the City of Freeport, defendant in error in the above entitled cause, be required to file its argument in reply to the argument of plaintiff in error herein within such reasonable time as may be fixed by the court.

And that the above entitled cause may be considered by the court at the same time the said cause of *Rogers Park Water Company* v. *Fergus* is considered.

(3) Or, if either of the above requests shall not be consistent with justice or with the rules and practice of this court, that then leave be granted your petitioner also to file its said argument of counsel in the said cause of *Rogers Park Water Company* v. *Fergus*, as an argument of *amicus curiæ*.

To the end that your petitioner may not be bound by the judgment of this court which might be entered in said suit of *Rogers Park Water Company* v. *Fergus*, without first having had an opportunity to present reasons why the judgment of the Supreme Court of the State of

Illinois should not be reversed, and to the end that justice may be done in the premises.

Your petitioner further shows that it has caused a copy of this petition, notice of this motion, and a copy of said argument of its counsel to be served upon the counsel for defendant in error herein, as well as upon the respective counsel for the plaintiff in error and the defendent in error in the suit of *Rogers Park Water Company* v. *Fergus*.

FREEPORT WATER COMPANY,
*Plaintiff in Error*,
By GEORGE C. FRY,
*Its Counsel*.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

October Term, A. D. 1900.

Freeeport Water Company,
*Plaintiff in Error,*
*vs.*
City of Freeport,
*Defendant in Error.*

*Gen. No. 17,833.*
*Term No. 348.*

*To the City of Freeport, Defendant in Error in the above entitled cause:*

You are hereby notified that I shall appear before said court on the opening of court on Monday, October 29, A. D. 1900, or as soon thereafter as counsel can be heard, and present the petition of the Freeport Water Company, plaintiff in error, a copy of which petition is herewith handed you, and ask that an order may be entered pursuant to the request of such petition; at which time and place you may appear if you see fit.

And I hereby furnish you a copy of the argument of the Freeport Water Company referred to in the said petition.

Dated this 26th day of October, A. D. 1900.

THE FREEPORT WATER COMPANY,
By GEORGE C. FRY,
*Its Counsel.*

Received copy of above notice, and of the petition and argument therein referred to, this 26th day of October, A. D. 1900.

R. N. BOTTSFORD,
*Attorney for Defendant in Error.*

(*Note.* Said Botsford being the counsel who appeared in the Circuit and Supreme Courts of the State of Illinois on behalf of defendant in error, there being no counsel of record for defendant in error in this court.)

Said notice was also served on the City of Freeport, defendant in error, the return of service thereon being as follows:

STATE OF ILLINOIS, }
STEPHENSON COUNTY. } ss.

Henry C. Hyde, of lawful age, being first duly sworn, deposes and says that on the 26th day of October, A. D. 1900, he delivered a true copy of the above and foregoing petition and notice, to George Tandy, who now is and for the five years next last past has been city clerk of the City of Freeport, defendant in error in the cause entitled in said petition and notice as the Freeport Water Company *v.* The City of Freeport (the mayor of said city being absent from the State of Illinois); affiant further says that on the same day and at the same time he delivered to said Tandy, as such city clerk, a true copy of the brief and argument for the plaintiff in error in said cause, made by George C. Fry and James W. Hyde, attorneys for said plaintiff in error, and further affiant says not.

HENRY C. HYDE.

Subscribed and sworn to before me this 26th day of October, A. D. 1900.

PETER E. MCDONALD,

[NOTARIAL SEAL.] *Notary Public.*

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

October Term, A. D. 1900.

Rogers Park Water Company,
*Plaintiff in Error,*
*vs.*
John B. Fergus,
*Defendant in Error.*

*Term No. 56.*
*Gen. No. 17,407.*

*To Newton A. Partridge, Esq., Attorney for Plaintiff in Error, and Jesse B. Barton, Attorney for Defendant in Error:*

GENTLEMEN—You will please take notice, that on the opening of court on Monday next, October 29th, A. D. 1900, or as soon thereafter as counsel can be heard, I shall appear before said court and present the petition of the Freeport Water Company, a copy of which is hereto annexed, and ask that an order be entered in the above entitled cause in pursuance of the prayer of said petition, at which time and place you may appear if you see fit.

I herewith furnish and deliver to you a copy of the argument of the Freeport Water Company in the suit now pending in said Supreme Court of the United States wherein the Freeport Water Company is plaintiff in error and the City of Freeport defendant in error.

Dated this 26th day of October, A. D. 1900.

THE FREEPORT WATER COMPANY,
By GEO. C. FRY,
*Its Counsel.*

Received copy of foregoing notice, and of the petition and argument therein referred to, this 26th day of October, A. D. 1900.

NEWTON A. PARTRIDGE,
*Attorney for Plaintiff in Error.*
JESSE B. BARTON,
*Attorney for Defendant in Error.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

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THE FREEPORT WATER COMPANY,
*Plaintiff in Error,*

*vs.*

THE CITY OF FREEPORT,
*Defendant in Error.*

Error to the Supreme Court of the State of Illinois.

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## BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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### I.

### STATEMENT OF THE CASE.

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MAY IT PLEASE THE COURT:

This cause, which comes before the court on a writ of error to the Supreme Court of Illinois, is an action of assumpsit brought by the Freeport Water Company, plaintiff in error, against the City of Freeport, defendant in error, for the price of water delivered by plaintiff in error to, and used by defendant in error, from and between January 1, 1896, and July 1, 1896.

The summons was made returnable to the September, A. D.

1896, term of the Circuit Court of Stephenson County, Illinois.

The declaration consists of two special counts and the common counts. The special counts set forth *verbatim* an ordinance passed by the common council of the City of Freeport on June 6, 1882.

So much of the ordinance as is material on this hearing is as follows:

"*Section 1.* Be it ordained by the city council of the City of Freeport: That there is hereby given and granted to Nathan Shelton or his assigns the exclusive right and privilege, for the term of thirty years from the first day of July, 1882, of supplying the City of Freeport, in the County of Stephenson and State of Illinois, and the citizens thereof, by a system of water works, with good, clear water suitable for domestic and manufacturing purposes, subject to the terms and conditions set forth in this ordinance. The source of supply of such water shall be the Pecatonica river above where any sewage or filth from Freeport enters the river. All said water shall be filtered."

*Section 2*, after providing for use of streets, etc., recites that

"The rights and liabilities provided for in this ordinance shall continue for a period of thirty years, *unless sooner* extinguished by *purchase*, as hereinafter provided."

*Section 4* provides for the character and capacity of the machinery and of the supply of water; the length and size of mains; the test to which the pipes shall be subjected prior to being laid; and that the capacity of such water works and supply "shall be increased as the growth of the city and its needs require."

In *Section 6* defendant in error reserves the right to acquire by purchase and become the sole owner of said water works, including all machinery, mains, pipes, buildings and property thereto appertaining at the expiration of thirty years from the

first day of July, 1882, upon paying to the owners the value thereof, to be ascertained by appraisement, and provides for the manner of appraisement and payment therefor.

"*Section 7.* The said Nathan Shelton or his assigns shall erect double nozzle fire hydrants upon all mains ordered laid by said city council in said city at the rate of not less than ten to each mile of said mains, and shall erect said fire hydrants whenever and wherever said city council shall direct. And said city shall pay to said Nathan Shelton or his assigns as an annual rental for the first *one hundred* of said hydrants the sum of *one hundred dollars* each; for all said hydrants over *one hundred* and up to *one hundred and fifty*, an annual rental of *eighty dollars* each, and for all of said hydrants over *one hundred and fifty* an annual rental of *fifty dollars* each; which said rentals shall be payable semi-annually on the fifteenth days of January and July in each year, and the pay of each hydrant shall commence when each hydrant is actually ready for use and the city officially notified thereof, *and shall continue during the full term specified in this ordinance unless said city shall sooner become the owner of said water works as hereinbefore provided, in which event said rental shall cease.*"

*Section 8* provides for the capacity and pressure required upon the completion of the works and as to the notice to be given defendant in error prior to its acceptance of the same.

"*Section 9.* The city shall have the right to use, free of charge, water from the hydrants on streets curbed and guttered for the purpose of washing and flushing the gutters and from any hydrant for the purpose of flushing any and all sewers in said city whenever the city council shall deem it necessary, for sanitary purposes, upon giving notice to the person in charge of said water works. The city shall have water free of charge for the use of the fire department, and for furnishing the city hall and the offices occupied for city purposes, for all public schools of the city, for all churches and for four public fountains *for drinking only* and one fountain in the public square or park, should the city erect the same."

*Section 10* provides that water rates shall not exceed the maximum rates to customers as in such section fixed, and that "rents for all other purposes not herein named will be fixed

by meter measurement, as may be agreed upon between the consumer and the water company, not exceeding the following meter rates" (specifying such rates).

*Section 11* provides that Shelton or his assigns shall extend mains in streets where no pipes are laid, as therein provided, and that the

"City shall have free and unobstructed use of all private hydrants, stop cocks or faucets in said city, for the purpose of extinguishing fires, free of charge to said city for such purpose."

*Section 12* provides that Shelton shall commence the erection of the water works within thirty days from July 1, 1882, and unless the same shall be completed before the 1st day of July, 1883, all rights and franchises therein granted should become null and void.

"*Section 13.* This ordinance shall become binding as a contract between the City of Freeport, Illinois, and Nathan Shelton or his assigns upon the filing with the city clerk of a written acceptance thereof by Nathan Shelton or his assigns, provided the same shall be done within thirty days from the passage and publication of this ordiance, *and this ordinance when so accepted shall not be altered, amended or changed in any way without the concurrence and consent of both parties thereto and interested therein or their successors or assigns.*"

The declaration then avers that said ordinance was duly accepted in writing by Nathan Shelton on June 7, 1882; that by such acceptance, defendant in error, on June 7, 1882, entered into a contract whereby it promised to pay said Shelton and his assigns an annual rental on the first 100 hydrants to be erected by him the sum of $100 each, and for all hydrants over 100, and up to 150, an annual rental of $80 each, payable semi-annually on the 15th day of January and July of each year; that on August 8, 1882, said Shelton assigned all his rights under such contract to plaintiff in error, of which fact defend-

ant in error had due notice; that plaintiff in error afterward completed such contract, and on the 18th day of December, A. D. 1882, the defendant in error thereupon accepted the same from plaintiff in error, as a full compliance with the terms of the said contract; that plaintiff in error has, since the completion and acceptance of said water works, in all things complied with said contract; that plaintiff in error constructed 121 hydrants as required by section 7 of said ordinance, and as ordered by defendant in error, and which hydrants were in operation on January 1, 1896; that defendant in error paid all rentals becoming due prior to January 1, 1896; that plaintiff in error had 121 such hydrants, which were in proper repair and fit for use, from January 1, 1896, until July 1, 1896, and that there was due on July 15, 1896, to plaintiff in error from defendant in error, for rent of such hydrants, the sum of $5,840.

Defendant in error filed two special pleas to the entire declaration.

These amended pleas recite, in substance, that the defendant in error was, on the 6th day of June, 1882, a municipal corporation organized under the general laws of the State of Illinois for the incorporation of cities and villages, and that, in pursuance of the statutes of said state relating to water works, passed said ordinance on June 6, 1882, and that said Shelton on the 7th day of June, 1882, accepted the provisions thereof.

That the water rates as fixed by the ordinance of June 6, 1882, were unjust, unreasonable and oppressive, and continued to so remain until the 10th day of February, A. D. 1896, when the city council, acting under its legislative capacity, and pursuant to the then-existing statutes of the State of Illinois relating to water works, caused to be enacted another ordinance whereby defendant in error re-adjusted and fixed such rates so as to make the same just, reasonable and fair, and that such or-

dinance was duly published, and on February 11, 1896, became a legal and valid enactment and was thereafter in force according to the terms and provisions thereof.

The ordinance of February 10, 1896, is set out *verbatim* in the first amended plea.

Said ordinance, so far as material, is as follows:

"*Section 1.* That the Freeport Water Company, a corporation now furnishing to the City of Freeport and its inhabitants water for fire protection, domestic uses and manfacturing purposes and other uses and purposes, shall be entitled to charge and receive therefor, and for the use of water meters, the rates and prices hereinafter fixed, and no more.

"*Section 2.* Said corporation shall be entitled to charge and receive from the City of Freeport for all water furnished for fire protection and other publ c uses and purposes, as hereinafter defined and enumerated, an annual rental or rate of *fifty* (*$50*) *dollars for each* double nozzle *fire hydrant* now in use in said City of Freeport, or any that may be ordered hereafter by the city council of the City of Freeport, such rental to be payable in semi-annual installments on the fifteenth (15th) day of January and July. * * * The above rate and rental shall be in full payment for all water furnished, as follows: For fire protection, including the furnishing and setting of fire hydrants for all water used by the fire department in extinguishing fires and in practice; for all water used by the committee on water for cleaning, washing, flushing gutters and sewers in said city, and for all water used for the city hall, fire and police stations and other city offices; for drinking fountains and fountain in park, when desired, and for all public schools and churches in the city."

*Section 3* establishes, in detail, maximum rates for water to be furnished for domestic uses, manufacturing purposes and other uses and purposes where furnished without meter.

(These rates are from 10 to 50 per cent. less than those established in the ordinance of June 6, 1882.)

"*Section 4.* Said corporation shall be entitled to charge and receive for water furnished for domestic uses, manufacturing purposes and other uses and purposes where such water is

furnished or measured by meter—the following rates shall be in full for water furnished for rent or for use of meter and for turning on and turning off water." (Rates given as established.)

(These rates are from 25 to 60 per cent. less than those established in the ordinance of June 6, 1882.)

"*Section 6.* Said corporation, so operating water works in the City of Freeport, shall be subject to the provisions of this ordinance, and said corporation and its officers, agents and employes wilfully charging or collecting for water furnished at a greater rate than is fixed in sections 3 and 4 hereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one ($1) dollar nor more than one hundred ($100) dollars and costs of prosecution."

*Section 7* repeals all ordinances and parts of ordinances inconsistent therewith.

"*Section 8.* This ordinance shall take effect and be in force from and after its passage and publication, provided that nothing herein shall be construed to abridge the power of the city council to further regulate or fix water rates and charges for the use of water meters."

The pleas further aver that said ordinance establishes water rentals for fire hydrants thereafter to be paid by defendant in error at the sum of $50 for each hydrant, payable at the same times as provided in the ordinance of June 6, 1882. That defendant in error paid plaintiff in error on the 10th day of July, 1896, for rentals due on February 11, 1896, at the rate provided in the ordinance of June 6, 1882, and for rentals since February 11, 1896, at the rate provided in the ordinance of February 10, 1896, the sum of $3,700, and that such sum of money so paid was all the money then due plaintiff in error as rentals for such hydrants. Plaintiff in error demurred to said amended pleas.

The Circuit Court overruled the demurrers to both pleas. Plaintiff in error stood by its demurrer. The Circuit Court thereupon rendered judgment in favor of defendant in error and against plaintiff in error.

Plaintiff in error then took an appeal from such judgment to the Supreme Court of Illinois.

The errors assigned on the record in the Supreme Court of Illinois, and which were relied upon by plaintiff in error, raised the question whether or not the ordinance of February 10, 1896, passed under the act of June 6, 1891;

(1) Was in violation of section 10 of article 1 of the constitution of the United States of America, which prohibits any state from passing any law which impairs the obligation of contracts; and,

(2) Whether such ordinance was in violation of section 10, article 14, of the amendments to the constitution of the United States of America, which forbids a state to pass any law depriving any person of his property without due process of law. (Rec., p. 28.)

The Supreme Court of Illinois, on June 21, 1900, affirmed the judgment of the Circuit Court of Stephenson County. (See *Freeport Water Co.* v. *City of Freeport*, 186 Ill., p. 179, and Rec., p. 31.)

Plaintiff in error sued out a writ of error to the Supreme Court of Illinois to reverse such judgment.

The errors assigned in this court are substantially the same as those assigned in the Supreme Court of Illinois.

## II.

## ERRORS ASSIGNED.

(1) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas of defendant in error, because the ordinance passed February 10, 1896, set forth in said pleas, is in violation of section 10 of article 1 of the constitution of the United States of America, which prohibits any state from passing a law impairing the obligation of contracts.

(2) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas of defendant in error, and each of them, because the ordinance passed February 10, 1896, set forth in said pleas, is in violation of article 1 of section 14 of the amendments to the constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

(3) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas, and each of them, of defendant in error, because the statute of the State of Illinois in force February 10, 1896, relating to "water works," in said pleas referred to, are in violation of section 10 of article 1 of the constitution of the United States of America, which prohibits any state from passing a law impairing the obligation of contracts.

(4) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas, and each of them, of defendant in error, because the statutes of the State of Illinois, in force February 10, 1896, relating to "water works," in said pleas referred to, are in violation of article 1 of section 14 of the amendments of the constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

(5) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas, and each of them, of defendant in error, because the ordinance set forth in said pleas, and passed February 10, 1896, under and by virtue of the supposed authority of the then existing statutes of the State of Illinois relating to "water works," referred to in said pleas, and relied upon as the defense to said suit, impairs the contract made and entered into between Nathan Shelton, assignor of plaintiff in error, and the defendant in error, created by the ordinance in plaintiff in error's declaration mentioned, and the acceptance thereof, and by reason thereof is repugnant to section 10, article 1, of the constitution of the United States of America, which provides that no state should pass any law impairing the obligation of contracts.

(6) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to defendant in error's amended first and second pleas, and each of them, because the ordinance set forth in said pleas and passed February 10, 1896, under and by virtue of an act of the legislature of the State of Illinois, entitled "An Act to enable cities, towns, and villages incorporated under any general of special law of this state to fix the rates and charges for the supply of water furnished by any individual, company, or corporation to any such city, town, or village and the inhabitants thereof," approved June 6, 1891, being the statute of the State of Illinois then in force and referred to in said pleas and relied upon as a defense to said suit, impairs the contract made and entered into between Nathan Shelton, assignor of plaintiff in error, and defendant in error, created by the ordinance, and acceptance thereof, set forth in plaintiff in error's declaration, and by reason thereof is in violation of section 10, article , of the constitution of the United States of America, which provides that no state shall pass any law impairing the obligation of contracts.

(7) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling plaintiff in error's demurrer to defendant in error's amended first and second pleas, and each of them, for the reason that the ordinance of February 10,

1896, in said pleas mentioned, and passed under the supposed authority of the then existing statute of the State of Illinois relating to "water works," in said pleas referred to, is in violation of section 1, article 14, of the amendments to the constitution of the United States of America, which provides that no state shall deprive any person of its property without due process of law.

(8) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling plaintiff in error's demurrer to defendant in error's amended first and second pleas, and each of them, for the reason that the ordinance of February 10, 1896, in said pleas mentioned, passed under and by virtue of the supposed authority of the legislature of the State of Illinois, entitled "An Act to enable cities, towns and villages incorporated under any general or special law of this state to fix the rates and charges for the supply of water furnished by any individual company or corporation to any such city, town, or village and the inhabitants thereof," approved June 6, 1891, being the statute of the State of Illinois referred to in said pleas, is in violation of section 1, article 14, of the amendments to the constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

(9) The Supreme Court of the State of Illinois erred in entering the judgment in favor of the defendant in error and against the plaintiff in error on the 21st day of June, A. D. 1900, in said cause, because the ordinance of defendant in error of February 10, 1896, and the statute of the State of Illinois on which said ordinance is based, being an act of the legislature of the State of Illinois passed June 6, 1891, and in force July 1, 1891, and each of them, are in violation of section 10 of article 1 of the constitution of the United States of America, in that it impairs the obligation of the contract between Nathan Shelton and the defendant in error set out in the declaration of plaintiff in error herein.

(10) The Supreme Conrt of the State of Illinois erred in entering the judgment in favor of the defendant in error and against the plaintiff in error, on the 21st day of June, A. D. 1900, in said cause, because the ordinance of defendant in error of February 10, 1896, and the statute of the State of Illinois on which said ordinance is based, being an act of the

legislature of the State of Illinois passed June 6, 1891, and in force July 1, 1891, and each of them, are in violation of section 1 of article 14 of the amendments to the constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

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## III.

## BRIEF OF THE ARGUMENT.

### I.

### A.

Defendant in error is liable in assumpsit for water furnished by plaintiff in error and used by defendant in error.

Dillon on Mun. Cor., 480.
Beach on Pub. Cor., §§ 821, 1333.
Field on Cor., §273.
*Hitchcock* v. *Galveston*, 96 U. S., 341.
*Daniels* v. *Tearney*, 102 U. S., 415.

### B.

This court will ascertain from the record, and determine for itself, whether or not the contract has been impaired within the meaning of the Federal constitution, or whether the party has been deprived of its property without due process of law.

*Swift* v. *Tyson*, 16 Pet., 1.
*Ohio Co.* v. *Debolt*, 16 How., 433.
*Bridge Proprietors* v. *Hoboken*, 1 Wall., 116.
*Bank* v. *Skelly*, 1 Black, 436.
*Butz* v. *Muscatine*, 8 Wall., 575.
*Delmas* v. *Merchants Insurance Co.*, 14 Wall., 661.
*Edwards* v. *Elliott*, 21 Wall., 549.

*Murray* v. *Charleston*, 96 U. S., 432.
*Northwestern University* v. *People*, 99 U. S., 309.
*Wright* v. *Nagle*, 101 U. S., 791.
*Railroad* v. *Palmes*, 109 U. S., 244.
*Railroad* v. *Dennis*, 116 U. S., 667.
*Clark* v. *San Francisco*, 124 U. S., 639.
*McGahey* v. *Virginia*, 135 U. S., 662.
*Huntington* v. *Attrill*, 146 U. S., 657.
*M. & O. R. R.* v. *Tennessee*, 153 U. S., 486.
*Scott* v. *McNeal*, 154 U. S., 34.
*C., B. & Q. R. R.* v. *Chicago*, 166 U. S., 226.
*McCullough* v. *Virginia*, 172 U. S., 110.
*Water Power* v. *St. Ry. Co.*, 172 U. S., 487.
*Western Union Tel. Co.* v. *Ann Arbor R. R.*, 178 U. S., 239.

C

*The ordinance of June 6, 1882, was not modified or repealed by the ordinance of February 10, 1896.*

(1) It was the duty of defendant in error under its implied powers to provide its inhabitants with a supply of water.

Dillon on Mun. Cor., § 146.
*Hardy* v. *Inhabitants of Waltham*, 3 Metc. (Mass.), 163.

(2) Defendant in error was acting under the provisions of the City and Village Act, of which fact the courts take judicial notice.

*Potwin* v. *Johnson*, 108 Ill., 74.
*Harman* v. *Chicago*, 110 Ill., 411.
*Rock Island* v. *Cuinely*, 126 Ill., 415.

(3) The legislature of Illinois has repeatedly recognized by course of legislation this implied power to contract for waterworks. Such legislative construction is entitled to great weight.

*People* v. *Hutchinson*, 172 Ill., 486.
*People* v. *Knopf*, 182 Ill., 165.
*Bank* v. *Collector*, 3 Wall., 195.
*Ex Parte Crow Dog*, 109 U. S., 556.
*Viterbo* v. *Freelander*, 120 U. S., 707.

D.

(1) Municipal corporations are invested with all powers necessary to carry out the provisions of the statute.

1 Dillon on Mun. Cor., §§ 89, 90, 443.
*City of Galena* v. *Corwith*, 48 Ill., 423.
*Montgomery Co.* v. *Barber*, 45 Ala., 237.
*Douglass* v. *Mayor of Virginia City*, 5 Nev., 147.

(2) Except where limited by the constitution the legislature is unrestricted in its sovereignty.

Cooley on Con. Lim., 87.

It is also settled that the legislature can delegate its power to a municipality.

Cooley on Con. Lim., 204.
Dillon on Mun. Cor., § 96.
*Wright* v. *Nagle*, 101 U. S., 791.
*New Orleans Water Co.* v. *City of New Orleans*, 164 U. S., 481.

*St. Ry. Co.* v. *Citizens Ry. Co.*, 166 U. S., 557.
*Penn Mutual Life Association* v. *Austin*, 168 U. S., 685.
*Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9.

(3) Where authorized to make a contract, a municipal corporation may make a binding contract and insert proper covenants, the same as an individual under like circumstances.

15 Amer. Ency. Law, p. 1080.
*City of Quincy* v. *Bull*, 106 Ill., 351.

(4) Words and phrases are to be used in their ordinary meaning and to be construed according to the rules of grammar.

Endlich on Interpretation of Statutes, § 2.
Potter's Dwarris Statutes, 237.
Bishop on Written Law, §§ 92d, 93.
*U. S.* v. *Kirby*, 7 Wall., 482.
*Robertson* v. *French*, 4 East., 137.

(5) The grammatical construction of the statute is that the legislature intended that the municipality should make a contract for water rates at a fixed price for the entire period of thirty years authorized by the statute.

(6) The court should construe the statutes, when so capable of construction, so as to carry out the intention of the parties.

*Binghamton Bridge Co.*, 3 Wall., 51.
*City of Vincennes* v. *Citizens Gas Light Co.*, 132 Ind., 114.
*Tunneson* v. *Whitworth*, 117 U. S., 129.

The stipulation in this contract being that the rights under such ordinance "shall continue for a period of thirty years," and that such ordinance "shall not be altered, amended or changed in any way without the concurrence and consent of both parties."

(7) The legislature knew that parties would not contract to invest their money in expensive works for a long period of time without a fixed rate for the entire period, and the contract was entered into under such circumstances.

*Illinois Trust & Savings Bank* v. *City of Arkansas City*, 40 U. S. App., 257.
*Maine Water Co.* v. *City of Waterville*, 93 Me., 586.
*Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 F. R., 663.
*Binghamton Bridge Co.*, 3 Wall., 51.

E.

In executing the contract under the ordinance of June 6, 1882, the defendant in error was acting in its capacity as a private corporation, and not in its public capacity as a sovereign.

(1) The establishment of water works pertains to a municipality as an individual, as distinguished from the state at large.

Dillon on Mun. Cor., § 58.
*People* v. *Herbert*, 24 Mich., 105.

(2) The city was acting, in making the contract, simply in its private capacity as an individual, and not as a sovereign.

1 Dillon on Mun. Cor., § 27.

15 Eng. & Amer. Ency. Law, 985.

*Hall* v. *Wisconsin*, 103 Wis., 5.

*Illinois Trust & Savings Bank* v. *City of Arkansas City*, 40 U. S. App., 257.

*City of Detroit* v. *Corey*, 9 Mich., 165.

*Gale* v. *Kalamazoo*, 23 Mich., 354.

*Western Savings Fund Society* v. *City of Philadelphia*, 31 Pa. St., 185.

*Cunningham* v. *City of Cleveland*, 98 F. R., 657.

*Indianapolis* v. *City of Indianapolis Gas Co.*, 66 Ind., 396.

*City of Newport* v. *Newport Gas Light Co.*, 84 Ky., 168.

*City of Greenville* v. *Greenville Water Works*, 27 Southern Rep., 764.

*City of Cincinnati* v. *Cameron*, 33 Ohio St., 336.

*Safety Insulated Wire Cable Co.* v. *Baltimore*, 13 C. C. App., 375.

*Little Falls Electric Light & Water Co.* v. *City of Little Falls*, 102 F. R., 663.

*Los Angeles City Water Co.* v. *City of Los Angeles*, 103 F. R., 730.

*Davis* v. *Gray*, 16 Wall., 203.

F.

(1) The great weight of authority is that when an expresss power is given to a municipality to contract or provide for water works, such municipality has the power to contract for fixed rate, and for a definite term.

*Atlantic City Works* v. *Atlantic City*, 48 N. J. Law, 378.

*Read* v. *Atlantic City*, 49 N. J. Law, 558.
*Ludington Water Supply Co.* v. *City of Ludington*, 119 Mich., 480.
*Cartersville Gas & Water Co.* v. *Mayor*, 89 Ga., 683.
*Grant* v. *City of Davenport*, 36 Ia., 396.
*Salena* v. *City of Neosho*, 127 Mo., 627.
*State* v. *City of Phillipsburg*, 23 Mont., 16.
*Crosby* v. *City Council of Montgomery* 108 Ala., 498.
*City of Greenville* v. *Greenville Water Works*, 27 So. Rep., 764.
*City of Indianapolis* v. *Indianapolis Gas Light & Coke Co.*, 66 Ind., 396.
*City of Connersville* v. *Connersville Hydraulic Co.*, 86 Ind., 184.
*City of Valparaiso* v. *Gardner*, 97 Ind., 2.
*City of Vincennes* v. *Citizens' Gas Light Co.*, 132 Ind., 114.
*City of Newport* v. *Newport Light Co.*, 84 Ky., 168.
*New Orleans Gas Light Co.* v. *The City of New Orleans*, 42 La. Ann, 188.
*City of Memphis* v. *Memphis Water Co.*, 5 Heisk., 529.
*Blood* v. *Manchester Electric Light Co.*, 68 N. H., 340.
*Andrews* v. *National Foundry*, 10 C. C. App., 60.
*Kimball* v. *City of Cedar Rapids*, 100 F. R., 802.
*Santa Ana Water Co.* v. *Town of San-Buenaventura*, 56 F. R., 339.

*Fergus Falls Water Co.* v. *City of Fergus Falls*, 65 F. R., 591.

*Los Angeles City Water Co.* v. *City of Los Angeles*, 88 F. R., 720.

*Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S., 558.

*Westerly Water Works* v. *Town of Westerly*, 75 F. R., 181.

*Defiance Water Co.* v. *City of Defiance*, 90 F. R., 753.

*South West Mo. Light Co.* v. *City of Joplin*, 101 F. R., 23.

*Little Falls Elec. & W. Co.* v. *City of Little Falls*, 102 F. R., 663.

*Insular Water Co.* v. *Baltimore*, 13 C. C. App., 378.

*State ex rel. City of St. Louis* v. *La Clede Gas L. Co.*, 102 Mo., 472.

*Livingston* v. *Pippin*, 31 Ala., 542.

*Rome* v. *Cabot*, 28 Ga., 50.

*Hale* v. *Houghton*, 8 Mich., 458.

*In re Pryor's Petition*, 55 Kas., 724.

*State ex rel.* v. *City of Great Falls*, 19 Mont., 518.

(2) The statutes passed at the session of the legislature of 1871 should be construed in *pari materia*.

Potter's Dwarris Statutes, 272.

Sedgwick Statute Law, 423.

1 Kent's Com., 463.

*Roche* v. *Smythe*, 13 Wall., 162.

*Northern Trust Co.* v. *Palmer*, 171 Ill., 383.

*South Park Commissioners* v. *First National Bank*, 177 Ill., 234.

(3) Having power to make such contract, the mode and manner is entirely within the discretion of the municipality, so long as (1) the rates are fixed by ordinance, and (2) the contract does not extend beyond thirty years.

*Grant* v. *City of Davenport*, 36 Ia., 390.
*City of Portland* v. *Portland Water Wks.*, 67 Me., 35.
*Maine Water Co.* v. *City of Waterville*, 93 Me., 586.
*City of New Orleans* v. *New Orleans Water Works*, 36 La. Ann., 432.
*Ludington Water Supply Co.* v. *City of Ludington*, 119 Mich., 480.
*Utica Water Co.* v. *City of Utica*, 10 Hun, 431.
*City of Livingston* v. *Pippin*, 31 Ala., 542.
*New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S., 650.

G.

The statute of 1891 should be construed to relate solely to such contracts as might thereafter be executed.

(1) Shelton could rely upon the statutes as they then existed.

*Rowan* v. *Runnells*, 5 How., 134.
*Douglass* v. *County of Pike*, 101 U. S., 677.
*Louisiana* v. *Pillsbury*, 105 U. S., 278.

(2) The statute of 1891 is to be construed prospectively.

Potter's Dwarris Statutes (Ed. 1871), p. 162.
Cooley's Con. Lim. (2d Ed.) 370.
Morowitz on Corporations, §1110.
*Gage* v. *Stuart*, 127 Ill., 207.
*Bauer Grocery Co.* v. *Zelle*, 172 Ill., 414.
*Santa Ana Water Co.* v. *Town of San Buenaventura*, 56 F. R., 339.
*Rowan* v. *Runnells*, 5 How., 134.
*Douglass* v. *County of Pike*, 101 U. S., 677.
*Shreveport* v. *Cole*, 129 U. S., 36.

H.

The legislature having authorized the making of the contract of June 7, 1882, such contract must stand unless attacked for fraud.

Tiedeman on Mun. Cor., § 175.
Cooley on Con Lim., 186–7.
15 Amer. & Eng. Ency. Law, 1046.
*New Orleans Water Co.* v. *New Orleans*, 164 U. S., 481.
*Little Falls Electric Light Co.* v. *City of Little Falls*, 102 F. R., 663.
*Sherlock* v. *Village of Winnetka*, 59 Ill., 389.
*Dunham* v. *Village of Hyde Park*, 75 Ill., 371.
*Brush* v. *City of Carbondale*, 78 Ill., 74.
*Warren* v. *City of Chicago*, 118 Ill., 329.
*City of Newport* v. *Newport Light Co.*, 84 Ky., 108.
*City of Memphis* v. *Memphis Water Co.*, 5 Heisk, 529.

*Godson* v. *Winchester, etc.*, 12 Bush., 114.
*Von Ripen* v. *Jersey City*, 58 N. J. Law, 262.

I.

The ordinance of June 6, 1882, does not create a monopoly.

*New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S., 650.
*Memphis* v. *Water Co.*, 5 Heisk, 529.
*B. & L. P. F. Co.* v. *Hawkey*, 31 Md., 339.
*Bartholomew* v. *City of Austin*, 29 Cir. Ct. App., 568.
*New Orleans Gas Co.* v. *New Orleans Light Co.*, 115 U. S., 650.
*St. Tammany, etc.*, v. *New Orleans Water Works*, 120 U. S., 64.
*Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill., 390.
*Bank of Hamilton* v. *Dudley*, 2 Pet., 492.
*Keokuk Packet Co.* v. *Keokuk*, 95 U. S., 80.
*Florida Cent. R. R.* v. *Schutte*, 103 U. S., 118.
*Town of Unity* v. *Burrage*, 103 U. S., 447,
*Vial* v. *Penniman*, 103 U. S., 714.
*Hills* v. *National Albany Exchange Bank*, 105 U. S,, 319.
*Evansville Nat. Bank* v. *Britton*, 105 U. S., 322.
*Presser* v. *Illinois*, 116 U. S., 252.
*Baldwin* v. *Franks*, 120 U. S., 678.

*Little Rock, etc., R. R.* v. *Worthin*, 120 U. S., 97.
*Field* v. *Clark*, 143 U. S., 649.
*Reagan* v. *Farmers L. & T. Co.*, 154 U. S., 362.

Defendant in error having been furnished water by the city, and used the same, is liable therefor under a *quantum meruit* (authorities, *supra*, p. 13), and the question of monopoly or exclusive license, therefore, does not arise in this case.

J.

In so far as the case of *City of Danville* v. *Danville Water Works*, 178 Ill., 299, holds to the contrary, it is opposed to the great weight of authority, and is founded on unsound reasoning.

(The authorities on which such case is founded distinguished, *infra*, p. 79.)

II.

A.

The ordinance of February 10, 1896, is in violation of the provision of section 10, article 1, of the constitution of the United States.

(1) The action of the common council, the defendant in error, is the action of the state.

*New Orleans Water Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S., 18.
*New Orleans Water Co.* v. *City of New Orleans*, 164 U. S., 481.
*City R. R. Co.* v. *Citizen's St. Ry. Co.*, 166 U. S., 557.

(2) Plaintiff in error, as assignee of Nathan Shelton, is entitled to all the rights acquired by Shelton.

2 Dillon Mun. Cor., 691.

*New Orleans Gas Light Co.* v. *Louisiana Light & Heat Co.*, 115 U. S., 650.

*Los Angeles* v. *Los Angeles Water Co.*, 177 U. S., 558.

*Santa Ana Water Co.* v. *Town of San Buenaventura*, 56 F. R., 586.

*Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 F. R., 663.

*State ex rel. City of St. Louis* v. *LaClede Gas L. Co.*, 102 Mo., 472.

*In re Pryor*, 55 Kan., 724.

(3) Corporations are persons, and are within the provisions of the Federal constitution equally with individuals.

*Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S., 210.

*Minneapolis, &c., Ry. Co.* v. *Beckwith*, 129 U. S., 26.

*Charlotte* v. *Gibbs*, 142 U. S., 386.

*Smythe* v. *Ames*, 169 U. S., 522.

*Blake* v. *McClurg*, 172 U. S., 259.

(4) The right of Shelton under the contract of June 7, 1882, became a vested right.

Where an ordinance is repealed, such repeal cannot operate retrospectively to impair private rights vested under it.

Dillon on Mun. Cor., Sec. 314.

Thompson on Corporations, §5413.

Tiedeman on Police Power, §188.

Sinking Fund Cases, 99 U. S., 700.
*Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall., 450.
*Tomlinson* v. *Jessup*, 15 Wall., 454.
*Pearsall* v. *Great Northern R. R. Co.*, 161 U. S., 673.
*Holyoke Water Power Co.* v. *Lyman*, 15 Wall., 500.
*Close* v. *Glenwood Cemetery Co.*, 107 U. S., 466.
*Douglas* v. *Kentucky*, 168 U. S., 488.
*Commonwealth* v. *Essex Co.*, 13 Gray, 213.

The obligation of a contract is the law which binds a a party to perform his agreement.

(5) A contract between a state and an individual is as obligatory as any other contract.

*Piqua Bank* v. *Knopp*, 16 How., 369.
*Von Hoffman* v. *Quincy*, 4 Wall., 435.

(6) The state can do no act which impairs the obligation of a contract.

*Fletcher* v. *Peck*, 6 Cranch, 87.
*Dartmouth College* v. *Woodward*, 4 Wheat., 514.
*Green* v. *Biddle*, 8 Wheat., 86.
*West River Bridge Co.* v. *Dick*, 6 How., 523.
*Trustees Vincennes* v. *State of Indiana*, 14 How., 286.
*Chicago* v. *Sheldon*, 9 Wall., 50.
*Penna. College Case*, 13 Wall., 190.
*New Jersey* v. *Yard*, 95 U. S., 104.

*Pearsall* v. *Great Northern R. R. Co.*, 161 U. S., 647.
*Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9.
*Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S., 558.
*Winter* v. *Jones*, 10 Ga., 190.
*Crosby* v. *City Council of Montgomery*, 108 Ala., 498.

B.

(1) Section 9 of the incorporation act does not apply to the contract of plaintiff in error, because it would be special legislation.

Section 23, article 4 of the constitution of Illinois (1 Starr & Curtis Stat., p. 134).
*R. R. Co.* v. *Jacksonville*, 67 Ill., 37.
*People* v. *Cooper*, 83 Ill., 585.
*Illinois Central Ry. Co.* v. *Bloomington*, 76 Ill., 447.
*Hawthorn* v. *People*, 109 Ill., 302.
*Eden* v. *People*, 161 Ill., 296.
*Lappmann* v. *People*, 175 Ill., 101.
*Barber* v. *Connelly*, 113 U. S., 27.
*San Diego Land Co.* v. *National City*, 174 U. S., 747.
*Williams* v. *Mississippi*, 170 U. S., 213.

(2) The act of 1891 does not purport to affect or modify the statute relating to corporations.

(3) There is nothing in the constitution or statutes of the State of Illinois by which the power to alter, amend, revoke or repeal is reserved to the legislature.

The right to repeal or amend statutes is now reserved in the constitution or statutes of most of the states by reason of the decision in the Dartmouth College case.

Such reservation should be expressed in the most explicit terms.

Morowitz on Corporations, § 1,108.

The reserved right to repeal cannot affect contracts already entered into.

*Curran* v. *State of Arkansas*, 15 How., 301.

*C. B. & Q. R. R. Co.* v. *Iowa*, 194 U. S., 155.

*Sinking Fund Cases*, 99 U. S., 710.

*Greenwood* v. *Union Freight R. R Co.*, 105 U. S., 13.

*Georgia R. R.* v. *Smith*, 128 U. S., 174.

*N. Y. & N. E. Ry. Co.* v. *Bristol*, 151 U. S., 567.

*Lake Shore R. R.* v. *Smith*, 173 U. S., 654.

*Citizens Water Co.* v. *Bridgeport*, 55 Conn., 1.

*Commonwealth* v. *Holyoke Water Power Co.*, 104 Mass., 446.

*Sage* v. *Dillard*, 15 B. Monroe, 341.

(4) Under the doctrine of *expressio unius* there is nothing in section 9 of the incorporation act which applies to the contract in question.

(5) The cases of *Spring Valley Water Works* v. *Schlotter*, 110 U. S., 347, and *San Diego Light Co.* v. *National City*, 174 U. S., 739, are not in conflict with our contention.

C.

The ordinance of 1896 was not passed under the police power of the state.

1 Dillon on Mun. Cor., § 142.
Cooley on Con. Lim., *p. 577.
*R. R.* v. *Maine*, 96 U. S., 511.
*Sinking Fund Cases*, 99 U. S., 700.
*New Orleans Gas L. Co.* v. *Louisiana Light &c. Co.*, 115 U. S., 650.
*New Orleans Water Works* v. *Reeves*, 115 U. S., 674.
*N. Y. & N. E. Ry. Co.* v. *Bristol*, 151 U. S., 567.
*Pearsall* v. *Great Northern Ry. Co.*, 161 U. S., 675.
*L. S. & M. S. Ry. Co.* v. *Smith*, 173 U. S., 689.

This, however, is no longer an open question in this court, as this court held in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9, that a contract for the supply of water is not within the control of the state under its police power for the purpose of impairing or abrogating a contract.

III.

The effect of the ordinance of February 10, 1896, was to take the property of plaintiff in error without due process of law in violation of section 10, article 14, of the amendments to the constitution of the United States.

A.

(1) The establishing of rates is a legislative and not a judicial act.

2 Redfield on Rys., § 246.
*Dow* v. *Biddelman*, 125 U. S., 680.
*Chicago, etc.*, v. *Wellmann*, 143 U. S., 344.
*Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S., 399.
*Inter State Commerce Commission* v. *R. R. Co.*, 167 U. S., 499.
*Munn* v. *People*, 94 U S., 13.

(2) The constitution of Illinois provides that the powers of the government are divided into "three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others."

Starr & Curtis Stat., 117.

Under this provision, it has been held that the judiciary has no power to infringe upon what are legislative acts.

*Field* v. *People*, 2 Scam., 279.
*City of Galesburg* v. *Hawkinson*, 75 Ill., 152.
*Dodge* v. *Cole*, 97 Ill., 338.

The act of 1891 authorizing the judiciary to *determine* reasonable rates confers upon them *legislative* functions. This the legislature cannot do.

(3) It is a maxim of the law that "*nemo debet esse judex in propria sua causa.*"

Broom's Legal Maxims, 118.
Cooley's Con. Lim., 412.
12 Am. & Eng. Ency. of Law, 44.

This maxim applies to all matters and situations where one is appointed to decide between conflicting rights in which he is interested, and applies equally to the *legislative*, executive or judicial department of the government.

*Washington Insurance Co.* v. *Price*, Hopkins' Ch. 1.
*Sanborn* v. *Fellows*, 22 N. H., 473.
*Dimes* v. *Grand Junction Canal*, 3 House of Lords Cases, 759.
*State* v. *Crane*, 36 N. J. Law, 394.
*Ames* v. *Port Huron Log Driving & Booming Co.*, 11 Mich., 139.
*Stoddard* v. *Moulthrop*, 9 Conn., 502.
*Earle* v. *Stocker*, 2 Vernon, 251.
*Regina* v. *Recorder of Cambridge*, 8 E. & B., 637.
*Walcott* v. *Ely*, 2 Allen, 338.
*McGough* v. *Wellington*, 6 Allen, 505.

And it is not within the province of the legislature to authorize a court, municipality or any body of persons to act as judge or pass upon his own rights in a matter in which he is interested.

(4) The fourteenth amendment to the constitution of the United States is prohibitive against all forbidden acts of the state, whether through its legislative, executive or judicial authorities.

*Ex parte Virginia*, 100 U. S., 339.
*Virginia* v. *Reeves*, 100 U. S., 313.
*Neal* v. *Delaware*, 103 U. S., 370.
*Yick Wo* v. *Hopkins*, 118 U. S., 356.
*Scott* v. *Neal*, 154 U. S., 45.
*Gibson* v. *Mississippi*, 162 U. S., 579.
*Blake* v. *McClurg*, 172 U. S., 260.

B.

(1) The rights of plaintiff in error under the contract were property rights.

2 Kent's Com., 251.
*Sinking Fund Cases*, 99 U. S., 700.
*Rigney* v. *City of Chicago*, 102 Ill., 77.
*Chicago & Western Indiana R. R.* v. *Englewood*, 115 Ill., 385.

(2) Such property rights can only be destroyed or interfered with by due process of law, that is, according to the "law of the land,"—"according to those rules and forms which have been established for the protection of private rights."

*Lake View* v. *Rosehill Cemetry Co.*, 70 Ill., 198.
*Board of Education* v. *Blakewell*, 122 Ill., 348.
*Railroad Commission Cases*, 116 U. S., 331.
*Pompelly* v. *Green Bay Co.*, 13 Wall., 166.
*Monongahela Nav. Co.* v. *U. S.*, 148 U. S., 324.

(3) The property rights of plaintiff in error having been taken from it by the action of the State under the Act of 1891, without any compensation paid therefor, it was deprived of its property without due process of law.

*Henderson* v. *Ry. Co.*, 21 F. R., 358.
*Scott* v. *City of Toledo*, 36 F. R., 395.
*Baker* v. *Norwood*, 74 F. R., 997.
*Davidson* v. *New Orleans*, 96 U. S., 102.

*Kentucky R. R. Tax Cases*, 115 U. S., 331.

*C. B. & Q. R. R.* v. *Chicago*, 166 U. S., 226.

2 Story on Constitution (5th Ed.), p. 676, at pp. 702, 703, §1956.

1 Hare's American Constitutional Law, 347–8.

*Mount Hope Cemetery Co.* v. *Boston*, 158 Mass., 509.

*Harness* v. *C. & O. C. Co.*, 1 Md. Ch. Dec., 249.

*Martin et al.*, *ex parte*, 8 Eng. (Ark), 199.

## IV.

### STATUTES CITED.

"An Act to enable cities and villages to contract for a supply of water for public use, and to levy and collect the tax to pay for water so supplied."

(Approved April 9, 1872, in force July 1, 1872.)

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities and villages where water works may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years."

Public Laws of Illinois of 1871, p. 271.

"An Act to provide for the incorporation of cities and villages."

(Approved April 10, 1872, in force July 1, 1872.)

"Section 1. The city council or board of trustees shall have power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or water works."

Public Laws of Illinois of 1871, p. 259.

(1 Starr & Curtis' Stat., p. 785, § 175.)

"An Act to enable cities, towns and villages incorporated under any general or special law of this state to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof."

(Approved June 6, 1891; in force July 1, 1891.)

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That the cor-

porate authorities of the city, town or village, now or hereafter incorporated under any general or special law of this state in which any individual, company or corporation has been or hereafter may be authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the Circuit Court of the county in which such city, town or village may be."

Public Laws of Illinois of 1891, p. 85.

(1 Starr & Curtis' Stat., p. 868, § 458.)

"Sec. 9. The General Assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: *And, provided, further*, that this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation."

(Section 9 Corporation Act; Starr & Curtis' Stat., p. 1006.)

## V.

## ARGUMENT.

### I.

### A.

There is no conflict as to the facts in this case. Plaintiff in error, it is admitted, has in all respects complied with the terms of the ordinance of June 6, 1882, in constructing the hydrants. It had constructed, on and prior to January 1, 1896, 121 hydrants, which were then, and continued until July 1, 1896, to be in proper condition, and fit for use. It furnished defendant in error all water through such hydrants which it was required to furnish under said ordinance. Defendant in error was in full possession of such hydrants, and has had full use of the water so furnished by plaintiff in error.

The only contention of defendant in error is, that the ordinance of February 10, 1896, should control as to the water rates to be paid for such hydrants, and that, having paid rental therefor for such period as provided in the ordinance of February 10, 1896, it had paid all sums due for such water rentals, and nothing remained unpaid therefor.

It is the admission of the pleas, that if the rates as established in the ordinance of June 6, 1882, should control, then there was due plaintiff in error for such water rents on July 1, 1896, the sum of $5,280.

The only question before the court is the effect of the ordinance of February 10, 1896.

If the ordinance of February 10, 1896, is void as in violation of section 10, article 1, of the constitution of the United

States, or section 1, article 14, of the amendments, to such constitution, and by reason thereof the ordinance of 1882 is not modified or repealed by such ordinance of 1896, then the plaintiff in error is entitled to recover in this action for the water furnished from January 1, 1896, to July 1, 1896, at the rates prescribed by the ordinance of June 6, 1882.

For as was said in the case of *City of East St. Louis* v. *East St. Louis Gas Light & Coke Co.*, 98 Ill., 427:

"What the city has received and enjoyed the benefit of under the contract, there is no principle of law which will justify it in its refusal to pay for."

Dillon on Mun. Cor., §480.
Beach on Public Cor., § § 821, 1333.
Field on Corporations, § 273.
*Hitchcock* v. *Galveston*, 96 U. S., 341.
*Daniels* v. *Tearney*, 102 U. S., 415.

B.

The first question that presents itself, is whether or not this court has jurisdiction.

It is well settled that this court will ascertain and determine for itself whether or not the contract has been impaired, within the meaning of the Federal constitution, or whether the party has been deprived of its property without due process of law.

*Swift* v. *Tyson*, 16 Pet., 1.
*Ohio Co.* v. *Debolt*, 16 How., 433.
*Bridge Proprietors* v. *Hoboken*, 1 Wall., 116.
*Bank* v. *Skelly*, 1 Black, 436.
*Butz* v. *Muscatine*, 8 Wall., 575.
*Delmas* v. *Merchants Insurance Co.*, 14 Wall., 661.
*Edwards* v. *Elliott*, 21 Wall., 549.
*Murray* v. *Charleston*, 96 U. S., 432.

*Northwestern University* v. *People*, 99 U. S., 309.
*Wright* v. *Nagle*, 101 U. S., 791.
*Railroad* v. *Palmes*, 109 U. S., 244.
*Railroad* v. *Dennis*, 116 U. S., 667.
*Clark* v. *San Francisco*, 124 U. S., 639.
*McGahey* v *Virginia*, 135 U. S., 662.
*Huntington* v *Attrill*,, 146 U. S., 657.
*M. & O. R. R.* v. *Tennessee*, 153 U. S., 486.
*Scott* v. *McNeal*, 154 U. S., 34.
*C. B. & Q. R. R.* v. *Chicago*, 166 U. S., 226.
*McCullough* v. *Virginia*, 172 U. S., 110.
*Water Power* v. *St. Ry. Co.*, 172 U. S., 487.
*Western Union Tel. Co.* v. *Ann Arbor R. R.*, 178 U. S., 239.

All that is required under the rules of practice of this court is, that it appear from the record "that a certain provision of the Federal Constitution or Act of Congress was relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied."

*Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116.

Such facts do appear upon the record.

C.

*The ordinance of June 6, 1882, was not modified or repealed by the ordinance February 10, 1896.*

(1) Plaintiff in error contends that the acceptance by Shelton of ordinance passed by the Common Council of the City of Freeport on June 6, 1882, constituted a valid contract impos-

ing upon Shelton and his assigns all the duties and obligations and giving them all the benefits and advantages to be derived from or accruing thereunder; and that the ordinance of the defendant in error of February 10, 1896, was in violation of Section 10 of Article I of the Constitution of the United States of America as impairing the obligation of contracts, and also in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States of America in depriving plaintiff in error of its property without due process of law.

No question is raised by defendant in error as to its power to pass an ordinance authorizing the execution of a contract for supplying the City of Freeport and its inhabitants with water for the term of thirty years. That it had such power is conceded.

Plaintiff in error contends that under the law and upon the construction of the statutes of the State of Illinois in force at the time the said ordinance of June 6, 1882, was passed and accepted, the defendant in error was authorized to pass an ordinance and enter into a contract thereunder fixing and establishing water rates and charges for the entire period of thirty years.

The contention raised by defendant in error being that while it admits it was vested with authority to pass an ordinance and enter into contract thereunder for thirty years, it had no power to establish such rates and charges for the entire period of thirty years, but that the rates to be charged for water to be supplied under the terms of such ordinance were subject to revision from time to time by ordinance of its Common Council.

We should determine first the powers of a municipal corporation as to providing water for corporate use, as well as for the use of its inhabitants.

Many authorities hold it to be the duty of a municipal cor-

poration to furnish a supply of water for itself and for its inhabitants, and this duty is an implied power and arises under what is known as the reserved police power.

"A city having power to pass ordinances respecting the police of the place, and to preserve health, is authorized, as sanitary and police regulation, to *contract* and procure a supply of water by boring an artesian well on the public square or otherwise, and *is the judge of the mode* best adapted to ac- the object."

Dillon on Mun. Cor., §146.
*Hardy* v. *Inhabitants of Waltham*, 3 Metc (Mass.), 163,

This *implied* power of a municipality to supply water was distinctly recognized by the legislature of the State of Illinois in 1872.

On the 22d of April, 1871, there was passed an Act entitled, "An Act in relation to the levy and collection of taxes for sewerage and *water works* in the cities of the state *that may have established a system* of sewerage and *water works* for such city." (Laws of Ill., 1871-2, p. 754.) This act provides that "The legislative authority of any such city *which now has*, or which may hereafter have, *established water works* for the supply of water to the inhabitants thereof, shall have power," etc., to annually levy a tax for the maintainance and extension of such water works. This statute applies to water works which have been constructed not under any express statute, as there was no statute expressly authorizing the construction of water works by individuals, but under the *implied* power of a municipality to construct such works. The legislature thus recognizes the legality of all water works theretofore "established" or constructed and the implied power vested in the municipality to establish such works.

But at the same session, however, the legislature of the

State of Illinois expressly authorized a municipality to contract for the erection of water works.

On the 9th of April, 1872, it passed an act which provides as follows:

"That in all cities and villages where water works may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages *may contract with such incorporated company* for a supply of water for public use for a period not exceeding thirty years."

And at the same session, such legislature passed an "An Act relating to cities and villages" which was approved April 10, 1872, and in force July 1, 1872, section 1 article 10 of which provides as follows:

"Section 1. The city council or board of trustees *shall have power to provide* for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water works, and to borrow money therefor and to authorize any person or private corporation to construct and maintain the same *at such rates as may be fixed by ordinance* and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water and injuries to such wells, pumps. cisterns, reservoirs or water works."

(2) The defendant in error, before the passage of the ordinance of June 6, 1882, adopted the provisions of the Act of 1872 relating to cities and villages.

That defendant in error did accept the provisions and acted under the provisions of such act is a fact of which the courts of Illinois took judicial notice.

*Potwin* v. *Johnson*, 108 Ill., 74.
*Harman* v. *Chicago*, 110 Ill., 411.
*Rock Island* v. *Cuinely*, 126 Ill., 415.

And such fact is admitted in the first amended plea.

These statutes passed at the session of the legislature of

1872 were all the laws of the State of Illinois relating to water works which were in force at the time of the passage and acceptance of the ordinance of June 6, 1882, and show that, to the extent of providing a supply of water for cities and villages the legislature delegated all power to the municipal authorities to do and perform all such acts as might be needful or necessary to carry out the powers contained in these statutes, and thus conferred upon them,

Under the act of April 9, 1872, municipal authorities were expressly empowered to "*contract * * * for a supply of water for public use*, for a period not exceeding thirty years." Under the act of April 10, 1872, such authorities were given "*power to provide for a supply of water*" * * * by the * * * construction of * * * water works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same *at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.*"

The legislature of Illinois has always recognized that providing a supply of water was one of the proper and usual powers of a municipality, and that it was the duty of a municipality to supply water.

In March, 1831, the legislature in an act providing for the incorporation of towns, it is recited that such municipality should have authority "to sink public wells, * * * to provide such means as they may deem necessary to protect such towns from injury by fires."

(Public Laws of Illinois of 1831, p. 84.)

This act was incorporated in the Revised Statutes of 1833.

(Public Laws of Illinois, 1833, p. 363.)

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It is a well known historical fact that prior to the adoption of the constitution of 1870 the legislature of the State of Illinois passed many special laws. In 1840 the legislature passed special charters for the cities of Springfield and Quincy. Section 8 of article 5 of the charter of the City of Springfield authorized such city "to provide the city with water, to dig wells and erect pumps in the streets for the extinguishment of fires and convenience of inhabitants."

(Public Laws of Illinois of 1839, p. 9.)

The charter of the City of Quincy contained identically the same power.

(Public Laws of Illinois of 1839, p. 116.)

Afterward, in 1849, the legislature passed another act to incorporate towns and cities which provided that all towns and cities incorporated under the general incorporation act should "possess all the powers authorized under the laws and amendatory acts incorporating either the cities of Springfield or Quincy."

(Section 4 Public Laws of Illinois of 1849, p. 224.)

And in 1855 the City of Freeport was incorporated by special act, wherein it was authorized "to provide the city with water, to erect hydrants and pumps, build cisterns and dig wells in the streets for the supply of engines and buckets."

(Private Laws of Illinois of 1855, p. 127, Section 8.)

The City and Village Act of 1872 was inserted bodily in the Revised Statutes of 1874. (Rev. Stat., 1874, p. 209—"Water." Sec. 169, p. 240.) It was not the intention to change the law relating to supply of water, but simply to codify the same and recognize the usual powers which were

passed by almost all legislatures, thus recognizing the duties and the implied powers of a municipal corporation as to furnishing a supply of water.

Similar provisions to those of the Illinois statutes relating to supplying water are found in the statutes of most of the states of the union.

The legislature of the State of Illinois, by this course of procedure, has recognized that it was the public policy of the state and duty of the municipalities under the general power for preservation of the health and comfort of its citizens, as well as providing against means for extinguishing fires, to provide a suitable water supply. This right, as we have seen, was not limited as to any particular *mode* or *manner* of providing for a supply of water. Those have been left entirely to the discretion of the municipality. They recognized that it was necessary to provide for water. They must have known that, with the advance in science and the improvements in machinery, the antiquated means of sinking wells to obtain water, and using buckets to extinguish fires, was no longer practicable. They must have known that large sums of money would be required to make such investments, in many cases beyond the power of a municipality to expend; that only where individuals would unite under the form of corporations could the money necessary to erect such improvements be obtained. That such corporations were organized is a matter of history. The books are full of cases involving construction of such contracts.

With this knowledge that municipalities did so contract, the repeated legislative construction by such enactments is entitled to very great weight, in showing that all powers necessary to carry out the provisions of the Act of 1872 to procure a supply of water were intended by the legislature to be given to the municipality.

*People* v. *Hutchinson*, 172 Ill., 486.
*People* v. *Knoff*, 183 Ill., 410.
*Bank* v. *Collector*, 3 Wall, 495.
*Ex Parte Crow Dog*, 109 U. S., 556
*Viterbo* v. *Frielander*, 120 U. S., 707.

D.

*Municipal corporations are, by the terms of these statutes, invested with all powers necessary to carry out such statute.*

(1) All powers necessary to carry out the provisions of the statutes not expressed therein are necessarily implied.

In Dillon on Municipal Cor., section 89, it is said:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First. Those granted in express words. Second. Those necessarily or fairly implied in, or incident to the powers expressly granted. Third. Those essential to the declared obligations and purposes of the corporation not simply convenient, but indispensible."

At section 90, it is said:

"And, therefore, it has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purposes of their creation which are reasonably proper to give effect to powers expressly granted."

"Where there are express provisions on the subject, these will, of course, measure as far as they extend the authority of the corporation. To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is indeed an implied or incidental authority to contract obligations."

Dillon on Mun. Cor., § 443.

This doctrine was early recognized in Illinois.

Says Mr. Justice BREESE, in *City of Galena* v. *Corwith*, 48 Ill., 423, when speaking of the power of a municipality:

"We believe it to be a well settled doctrine that corporations have all the powers of ordinary persons, as respects their contracts, excepting when they are expressly *or by necessary implication restricted*, and that they have all the power to carry out an expressly granted power."

The doctrine announced by Dillon in the text has been cited and approved in numerous of the cases cited in the note thereto, two of which are the following:

In *Montgomery Co.* v. *Barber*, 45 Ala., 237, where a county was declared by the statute to be a body corporate, the court say:

"As to all matters and things that properly appertain to a county, they have the same powers to contract and be contracted with as individuals. * * Where the mode and manner of contracting are not prescribed or the persons or agents by and with whom contracts are to be made, counties may make contracts in the same manner as individuals or other corporations."

Speaking of the power of municipal corporations, in *Douglas* v. *Mayor, etc., of Virginia City*, 5 Nev., 147, the court say:

"That a municipality like a trading corporation may, unless in some way restricted by charter, enter into any contract necessary to enable it to carry out the powers conferred upon it * * * or, in other words, that it has the right to adopt all the ordinary or usual means which may be necessary to the full execution or enjoyment of the power expressly given by its charter, is so firmly established by the authorities that at the present day it may be considered an elementary principle of the law of corporations (*Ketcham* v. *City of Buffalo*, 4 Kernan, 356.)"

(2) It is well settled that the legislature has all the powers of sovereignty except as limited by its constitution.

"In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power, as it rests in and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose,

and to the limitations which are contained in the constitution of the United States."

Cooley on Con. Lim., *87.

It is also well settled that the legislature can delegate its power to a municipality.

Cooley on Con. Lim., 204.
D llon on Mun. Cor., § 96.
*Wright* v. *Nagle*, 101 U. S., 791.
*New Orleans Water Co.* v. *City of New Orleans*, 164 U. S., 481.
*City Railway Co.* v. *Citizens R. R. Co.*, 166 U. S., 557.
*Penn. Mutual Life Assn.* v. *Austin*, 168 U. S., 685.
*Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 7.

The power delegated by the legislature of this state to municipal corporations under the statutes of 1872 authorizing them to contract for a supply of water is plenary and unlimited, provided only that (1) the term of the contract does not exceed thirty years; and that (2) the rates are fixed by ordinance.

When the legislature, therefore, made this grant, it vested the common council and mayor of the City of Freeport with full power to make such terms as in their discretion, and within the said two limitations, they might deem best.

(3) The power so delegated by the state to the city was a power to make a *binding* contract the same as an individual could make under similar conditions.

"A municipal, like a trading or business corporation, may, unless in some way restricted by its charter or fundamental

law, enter into any contract necessary to enable it to carry out the powers conferred upon it."

15 Amer. Ency. Law, p. 1080.

Mr. Justice SHELDON says, in *The City of Quincy* v. *Bull*, 106 Ill., 351, when speaking of the charter of the City of Quincy, which authorized that city to provide its inhabitants with water:

"The power to make a contract, *but not to make a binding one, is unmeaning.* Where there is power to make a contract there is power to make one that shall bind. * * * The state itself may not revoke a grant it has made. The city must be bound by the contract and the grant it has made, and has authority to make the same as would an individual."

*Having authority to make such contract, the city had the same authority to make such covenants as were necessary for the full enjoyment of the power as an individual would.*

The constitution does not inhibit the legislature in its sovereign power from authorizing such grant or contract. The same authority of sovereignty gave the legislature power, not only to grant a right to contract for water-works for a fixed term, but also power to grant the right upon terms as to water rates and charges as the legislature or its delegate, the municipal corporation, might deem best. It was in the power of the legislature, when authorizing the execution of such contract, to have provided "such rates as may be fixed by ordinance," by adding thereto, "as the corporate authorities might, from time to time, deem just and reasonable." There would have been no controversy if some such expression had been used. The legislature did not so do, but authorized the execution of a contract (1), "at such rates as may be fixed by ordinance" at the time of making the contract—not by such ordinance as might be passed from time to time thereafter; or (2) in such *mode* and *manner* as to them in their sound discretion should seem best to provide for a supply of water for public use for thirty years.

(4) Plaintiff in error is not here seeking rights under a special statute which the courts would presume was drawn by it and therefore apply the doctrine of *strictissimi juris* in its construction, but is here under a general statute which, if the words are construed in their ordinary meaning and by their grammatical construction, must be construed as contended for by us.

Lord ELLENBOROUGH in *Robertson* v. *French*, 4 East., 137, said:

> "Words are to be understood in their plain everyday and popular sense unless they have acquired peculiar or technical meaning."

Statutes are construed the same way.

> "Words and phrases are to be used in their ordinary meaning and are to be construed according to the rules of grammar."
>
> Endlich on Interpretation of Statutes, Sec. 2.
> Potter on Dwarris Stat., 237.
> Bishop on the Written Law, §§ 92*d* & 93.
> *U. S.* v. *Kirby*, 7 Wall., 482.

(5) The Century Dictionary defines the word "and" as "A word connecting a word, phrase, clause or sentence with that which precedes it; a colorless particle, without an exact synonym in English, but expressed approximately 'with; along with; together with; besides; also; moreover; the limitations connected being *grammatically co-ordinate*.'"

Webster defines "and" as a particle which expresses the relation of connection or addition. It is used to conjoin a word with a word; a clause with a clause or a sentence with a sentence.

It is not necessary to define "co-ordinate," but Webster defines it "equal in rank or order—not subordinate."

The second clause, "and for a period not exceeding thirty years," is, therefore, co-ordinate with—that is, of equal rank

and dignity; equal power with—the first clause authorizing a municipality to execute a contract "at such rates as may be fixed by ordinance"; in other words, the grammatical language is, that the common council may authorize any person to construct water works at such rates as the council may fix by ordinance, and at the same time having fixed the rates by ordinance, such rates shall continue for a period not exceeding thirty years. Defendant in error does not seriously deny that the grammatical construction of the statute is as we contended, or seriously contend that the statute should not be construed to mean what it says, viz., fix the price of water by ordinance for the full term of thirty years It does contend, however, that the legislature did not intend to part with its reserved police power, because this was the public policy of the state. That the doctrine of police power does not apply to the facts as shown in the record, we have elsewhere fully established (*infra*, 107 ).

(6) This is the grammatical construction of the statute, and this, undoubtedly, is the way the legislature intended it should be understood.

In *Binghamton Bridge Co.*, 3 Wall., 51, Mr. Justice DAVIS, while recognizing the rule that where a charter is susceptible of two interpretations, that interpretation should be adopted which works the least harm to the state, says that:

"It should never be lost sight of, that the main canon of interpretation of a contract is to ascertain what the parties themselves meant and understood."

The same reasoning was applied by the court in the case of *City of Vincennes* v. *Citizens Gas Light Co.*, 132 Ind., 114, involving a gas contract, where the court say:

"It is the duty of the court, when the language of the contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put

upon the contract, and to enforce that construction has been so often asserted by this and other courts, that no doubt of its soundness can be entertained."

The same rule is applied to the construction of a statute which is as binding as a contract.

*Tennessee* v. *Whitworth*, 117 U. S., 129.

That the understanding of the parties was that the same rates should continue for the full period of thirty years is shown in the following provisions of the ordinance:

"Section 3. *The rights* and liabilities *provided for in this ordinance* shall continue for a period of thirty years unless sooner extinguished by the parties as hereinafter provided."

"Section 13. This ordinance, when so accepted, shall not be altered, amended or changed in any way without the concurrence and consent of both parties thereto, and interested therein, or their successors or assigns."

With the admitted authority of the legislature to delegate power to a municipal body to make a contract for thirty years, we might say (using the language of the court in *Illinois Trust & Savings Bank* v. *City of Arkansas City*, 40 U. S. App., 257):

"It is hardly possible that any individual or corporation could have been introduced to expend the thousands of dollars required to construct such works as have been built in this city in consideration of the right to use the streets of the city for that purpose, and of the promise of rental for its hydrants for the limited term of a single year. *These facts the members of the legislature must have known*, and they undoubtedly granted this plenary power to contract for the very purpose of enabling the cities to procure a supply of water for their inhabitants by grants of privileges to private parties to use their streets for that purpose for a reasonable term of years, and by covenants *to pay rentals* for hydrants *for a like term*."

On the same line, is the case of

*Maine Water Co.* v. *City of Waterville*, 93 Maine, 586.

where a city was authorized to, and did make a contract with a water company for twenty years, and as part of the compensation, the city covenanted that, in addition to the specified sum of money, they would pay another sum which amount equalled the amount of taxes that might be levied against the company's property, the court stated:

"We hold that a municipality may have a reasonably adequate consideration in the way of service rendered to it, for municipal purposes, agree to make compensation therefore for a term of years not unreasonably long, either in whole or in part by reimbursing the company in whole or in part, on the amount the company performing the service may be obliged to pay as taxes assessed upon this property," and upon the point made that such a contract was against public policy, they say: 'We do not think that the contract involved in this case is contrary to public policy. It is not for an unreasonably long period of time, and, in many cases, it is absolutely necessary for a city or town to make a water contract for a term of years in order to obtain the great benefits of a sufficient water supply for the protection of the property of its inhabitants against fire, to provide for the health of its citizens, by a proper sewerage system, and for other municipal purposes. Without a contract extending over a period of years, it would, we believe, frequently be the case that no individual or corporation could be found who would go to the expense of constructing a suitable and sufficient water plant that would answer the requirements for public purposes, as well as for domestic uses."

Says the court, in *Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 Fed. Rep., 663:

"The capital invested in a water or light plant, is subject to hazards from elements and other damages, and is permanently expended, and no prudent person would make such an investment except upon a contract for a fairly long terms of years."

This idea was recognized in *Binghamton Bridge Co.*, 3 Wall., 51, where Mr. Justice DAVIS says:

"The legislature, therefore, says to public-spirited citizens,

if you will embark with your time, money and skill in an enterprise which will accommodate the public interests, we will grant you for a limited period, or in perpetuity, privileges that will justify expenditure of money and the employment of your time and skill. Such a grant is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

The *Binghamton Bridge Co.* was decided in 1865.

The legislature of Illinois is presumed to have passed such acts in view of such decision.

The legislature must have known, as stated in the Arkansas City case, that no person would have entered into this responsible undertaking with the uncertainty and prospect that the water rents might be reduced by the city in one or each succeeding year, or even before the time contemplated for the completion of the work, while the supply of water to be demanded by the city free of rent, and to be used by the city for municipal purposes, would be constantly increasing during the continued growth of the city for the full term of the thirty years.

The power to make a contract includes, as a necessary incident, the power to fix the rate at which water would be supplied. To bring such question beyond the doctrine of implied powers, and so that the subsequent authorities might know that the municipal council had such authority, the Illinois legislature, in the act of 1872, expressly authorized the city, by ordinance, to make such contract for thirty years, provided only that the rates should be established by ordinance at the time the contract was made.

The legislature, knowing that "without a contract extending over a period of years, * * * no individual or corporation could be found who would go to the expense of constructing a suitable and sufficient water plant that would answer the requirements for public purposes, as well as for

domestic uses," and when the legislature authorized the municipality to execute a contract relating to water works, and where it is evident from the stipulation in the ordinance that the parties understood and stipulated that the contract established the rates for the full period granted by the ordinance, the court should give that construction to the ordinance which it is evident the parties in their stipulation made for themselves.

E.

*The defendant in error, in executing the contract under ordinance of June 6th, 1882, was acting in its capacity as a private corporation, and not in its public capacity.*

(1) In construing this contract, the court should construe the same, not as a contract made by defendant in error in its sovereign capacity, but as made by it in its private or business capacity, the same as if made by an individual.

"The power of a municipality to make a contract for goods, city supplies for buildings, gas, sewer, water and the like, is neither a judicial nor a legislative power, but purely a business power.

The establishment of gas works; of *water works*; the construction of sewers and the like, are matters which pertain to the municipality as distinguished from the state at large."

Dillon on Municipal Cor. Sec. 58.

*People* v. *Herbert*, 24 Mich., p. 105.

(2) Contracts which a municipal corporation may make for the purpose of supplying its inhabitants with water relate to the "Things of Commerce," as distinguished in civil law from "Things Public," which are regulated by sovereign power. Such contracts are not made by the municipal corporation by virtue of its power of legal sovereignty, but in the capacity as a private corporation. To supply water to its

inhabitants is no more the duty of the sovereignty than to supply its inhabitants with sewers, gas, coal, or the children in its public schools with school books; all can be supplied by private individuals.

The character of the business of furnishing water is not in itself such a one which it is the duty of the state to create and maintain, and therefore one in which all the public have a right to demand and share in, as railroads or highways, whose use is public, because the public may create it. This public use is very different from a public interest in the use.

The prime element in a contract executed by individuals is that there should be a consideration. No contract could be enforced without a consideration. And, when empowering a municipality to make a contract, such power authorizes the making of a contract with all the incidents and characteristics of a contract by a private person. The consideration for this contract were the mutual covenants made by plaintiff in error with defendant in error in its capacity as a private corporation.

There is no greater sanctity attending a contract made with a municipality than one made with individuals.

The municipality in the case at bar was acting simply in the same capacity as any other private person or corporation. In making this contract, therefore, it stands upon the same footing as would any individual or body of persons under like circumstances.

1 Dillon on Mun. Cor., § 27.
15 Eng. & Am. Ency. Law, 985.

In *Hall* v. *Wisconsin*, 103 U. S., speaking of a contract executed by the governor of the state under an act of the legislature, Mr. Justice SWAYNE, when construing that statute, speaking for the court, says:

"When a state descends from the plane of its sovereignty,

and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and bound accordingly."

In *Illinois Trust and Savings Bank* v. *City of Arkansas City*, in 40 U. S. App., 257, the court say:

"The city has two classes of powers, the one legislative, public, governmental, in the exercise of which it has a sanctity and governs its people, the other is proprietary and *quasi* private, conferring upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality, and in the exercise of the former class it is governed by the ruling here invoked, and in their exercise it rules its people and is bound to transmit its power to its successive set of officers unimpaired, but in the exercise of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it might exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules which govern the private individual or corporation. * * * In contracting for water works to supply its inhabitants with water the city is not exercising its governmental or legislative powers, but its business or proprietary powers; the purpose of such a contract is not to goveru its inhabitants, but to obtain a private benefit for the city itself and its denizens. The act to establish water works is an act for the comfort of its citizens, and is not one of those acts which come within the power or duties incidental to a corporation. In making such contracts it acts as an individual, and under the same rule relating to contracts with individuals, and not otherwise."

Says COOLEY, J., in *Gale* v. *Kalamazoo*, 23 Mich., 354, that if a corporation possesses power to make such a contract:

"Its contract for that purpose would be binding upon it to the same extent as would be a contract of an individual in a matter pertaining to his private business; indeed, in providing its members with these convienences this corporation would be acting in no different capacity than would any private corporation in providing any convienence in the discharge of its corporate functions, and there can be no difference in the legal

rules which would be applicable. The legislative power of the village might be called in for the exercise in order to give to the corporation authority to contract, but in entering into the contract the village might be regarded as in the light of an individual proprietor."

As was said in the case of *City of Detroit* v. *Corey*, 9 Mich., 165, when speaking of a sewer:

"The sewers of a city, like its works for supplying the city with water, are the private property of the city. They belong to the city, the corporation and its incorporators. The citizens are alone interested in them. The outside public, as people of the state at large, have no interest in them, as they have in the streets of the city which are public highways."

This distinction is so clearly set forth in *Western Savings Fund Society* v. *City of Philadelphia*, 31 Pa. St., 185, that we may be justified in quoting therefrom the following:

"As a local sovereign, it (the city) has no authority to enter into business of manufacturing and selling gas; for its sovereignty did not extend to such subjects any more than it did to almost any other manufacture. * * *

When such a corporation engages in things not public in their nature, its acts as a private individual, *no longer legislates*, but contracts, and is as much bound by its engagements as is a natural person. The distinction between public and private duties is wide and obvious."

In the case of *Cunningham* v. *City of Cleveland*, 98 Fed. Rep., 657, the question arose as to the power of the municipality to make a contract for a fixed price of water for a long period of time, and the court, in its opinion, say:

"It is further urged that one board of mayor and aldermen, though having the right to contract for their own terms, may not bind their successors in office by such a contract in reference to the use of the streets and public franchises. The power conferred upon the board of mayor and alderman of the City of Cleveland by the amendment of its charter, stated above, is the power to contract for the city, that is, the power to bind more than the agents of the city during their official terms. It is the power to bind the corporation itself, *and con-*

*sequently all its future agents.* The distinction between an act which is purely governmental and legislative, and capable of amendment or revocation by the municipal legislature immediately after it is done, and that which is contractual and irrevocable, though effected through the medium of legislation, is well understood, and need not be dwelt upon."

See also:

*Indianopolis* v. *Indianapolis Gas Co.*, 66 Ind., 396.

*City of Newport* v. *Newport Gas L. Co.*, 84 Ky., 168.

*City of Greenville* v. *Greenville Water Works*, 27 So. R., 764.

*City of Cincinnati* v. *Cameron*, 33 O. St., 336.

*Safety Insulated Wire Cable Co.* v. *Baltimore*, 13 C. C. App., 375.

*Little Falls Electric Light & Water Co.* v. *City of Little Falls*, 102 F. R., 663.

*Los Angeles City Water Co.* v. *City of Los Angeles*, 103 F. R., 730.

In construing this contract, the court should construe it in the same manner as they would construe a contract between private individuals.

In *Davis* v. *Gray*, 16 Wall., 203, where a construction of a land grant was involved, the court, speaking of that contract, Mr. Justice SWAIN, delivering the opinion, says:

"When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances."

Construing the contract in the same manner as if the same were a contract between two individuals, force should be given to that part of the contract which establishes the uniform water rates for thirty years, and the covenants of the parties contained in the contract.

F.

*The great weight of authority is, that when express power is given a municipality to contract or provide for the erection of water works, such municipality has the power to contract for fixed rates and for a definite term.*

The extent of the authority of a municipality to pass such an ordinance has frequently arisen.

No case can be found where their being an *express* power granted to a municipality to contract for the erection of water works and the municipality having made a contract under such power, at a stated price, where the courts have not sustained such action.

In *Atlantic City Works* v. *Atlantic City*, 48 N. J. Law, 378, the charter provided:

"The common council of the city shall have authority to provide by ordinance for a supply of water for said city."

An ordinance was passed for the payment of water rates so long as the water company should comply with its terms. No time for the duration of the contract, or price, was fixed by statute. That ordinance provided for the payment of a specified sum semi-annually as rent for water for fire. The cause came up on demurrer to the complaint, and the court held that the contract continued so long as the plaintiff company should comply with its obligations.

This case was approved and followed in

*Reed* v. *Atlantic City*, 49 N. J. Law, 558.

In *Ludington Water Supply Co.* v. *City of Ludington*, 119 Mich., 480, a contract was made in 1882 for a period of thirty-two years, between the water works and the city, whereby the city agreed to pay $80 annual rental per hydrant. The ordinance was subsequently changed by consent of the parties, but the rates were still fixed.

The court say:

"To the extent that the contract of the city to take its supply of water from the plaintiff and pay for it, gave the plaintiff an advantage over others desiring to do business of like nature, it is a necessary and legitimate result of its right to contract. * * * It is also insisted that the clause in the contract agreeing to continue in force the schedule of prices for water furnished to private consumers is an abdiction of the governmental functions, such as the city may not deprive itself of by contract."

But the court held such contract valid.

In *Cartersville Gas & Water Co.* v. *Mayor*, 89 Ga., 683, the city entered into a contract with the water company for five years, under which the water company was to be reimbursed for the water used at a fixed rental for the entire period of the contract. Such contract was held valid.

In *Grant* v. *City of Davenport*, 36 Ia., 396, where all incorporated towns and villages were authorized to construct water works or procure individuals or corporations to construct and operate them "on such terms as might be agreed upon," it was held that it was competent for the municipality to so enact, and that a contract executed under such authority, for a period of twenty-five years at a fixed rental, was valid.

In *Salena* v. *City of Neosho*, 127 Mo., 627, where under the provisions of the revised statutes (section 1589 Mo., Revised Statutes 1889), incorporated cities were authorized "to contract with individuals or corporations for water supply," and in case the price was not fixed in the contract, the common council had authority to fix the price, it was held that a contract made for twenty years at a fixed annual rental was valid.

In *State* v. *City of Phillipsburg*, 23 Mon., 16, in a mandamus suit to compel the city to audit water bills of the water company, it was held that a contract covering a water supply for ten years at a fixed rental was valid.

In *Crosby* v. *City Council of Montgomery*, 108 Ala., 498, an agreement was entered into between the city and the water company in 1885. In February, 1887, the legislature passed an act authorizing the cities to regulate water rates. In 1889 the city passed another ordinance changing the rates. The court held that it could not do this, as the city had full power to make the contract under the statute.

In the case of *City of Greenville* v. *Greenville Water Works*, 27 So. Rep., 764, a municipality was authorized to enact such laws, not contrary to the Constitution, as they deemed necessary for the good order or health of the city.

The court held that it had the power to contract for a water supply and that it had the power to bind the city on that account for a reasonable time, if not for the whole period named in the ordinance, and sustained the contract which was made to cover a period of twenty-five years.

In *The City of Connersville* v. *Connersville Hydraulic Co.*, 86 Ind., 184, and in *The City of Valparaiso* v. *Gardner*, 97 Ind., 2, where the statute gave the board of water trustees the "management and control of all matters relating to the supply of water," it was held that they could make a contract for twenty years at a stipulated annual rental.

In *City of Vincennes* v. *Citizens' Gas Light Co.*, 132 Ind., 114, the court says:

"The making of contracts for the supply of light and water for a considerable time, at fixed prices, is ordinarily necessary and permissible. *Crowder* v. *Town of Sullivan*, 128 Ind., 486; *Citizens* v. *Town of Elwood*, 114 Ind., 332."

In *City of Indianapolis* v. *Indianapolis Gas, Light & Coke Co.*, 66 Ind., 396, where the general corporation act authorized cities, "to construct and establish gas works and to regulate the establishment thereof by individuals or companies," it was held that the city could exercise such power according to

its discretion. In that case an ordinance gave the gas company the right to furnish gas for the use of the city in a corporate capacity for a period of five years, with a proviso at the city's election to extend the contract for five years longer at an agreed fixed compensation during the entire period. The court say:

"Municipal corporations, besides the power to contract, which is generally granted to them within certain limits, have legislative or governmental powers by which they make by-laws to govern themselves, and pass ordinances to govern others, as the citizens of the towns or cities within their geographical limits. This power of legislation within the authority delegated to them by law is distinct from the power to contract, and although exercised by the same corporation they cannot by contract delegate or restrict their legislative power, nor can they merely by their legislative power make a contract. These two powers need not be confounded. The exercise of the legislative power requires the consent of no person, except those who legislate, while it is impossible to make a contract without the consent of another or others. We think, therefore, that when the City of Indianapolis made the contract in question with the gas light company it made it in exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make a contract was authorized by an ordinance, and having the power to make a contract touching the subject-matter, it had a right to make it according to its own discretion as to its prudence and good policy within the limits of the franchise. Nor can we see that the contract in the least restricts the legislative power of the city, except that as the sanctity of the contract is shielded by the constitution of the United States, it cannot in the exercise of its legislative power impair its validity, and it would be a solecism to hold that a municipal corporation can impair the validity of a contract when the state which created the corporation by its solemn act has no such power."

* * * * *

"A municipal corporation not having either body, limbs, feet nor hands, but being merely a legal entity, cannot execute its own acts or administer its own affairs. To do this it must employ persons, other corporations or agencies of some kind;

and to employ them, and agree to pay them, is to make a contract, and if it could not make such contracts, and was not bound thereby, it could not carry on the purpose or attain the objects for which it was established. This ordinance will not execute itself, and to deny it the power to have them executed would be to render it useless and helpless. When it makes a contract within the scope of its power—not *ultra vires*—which is not against public policy, and not fraudulent, it must be enforced the same as a contract of a business corporation or person. * * * The authorities upon the question are too numerous to notice in detail, but we think their main current supports the view we have taken in this opinion. Nor do we think that upon principle they are seriously conflicting. The apparent conflict arises from applying the language generally, when it was meant to apply only to some particular municipality."

In *City of Newport* v. *Newport Light Co.*, 84 Ky., 168, where the City of Newport was authorized to construct, maintain and operate gas works and pass all ordinances necessary to regulate the same, the court say:

"It is purely a question of contract if the City of Newport had the right to contract with the appellee to furnish gas to the city and to such of its inhabitants as might desire to use it. The contract should be enforced, and neither the city nor any individual or corporation can interfere with its rights. * * * The city has exhausted its power and done that which under legislative authority it had the right to do. * * * We interpret this class of contracts and the legislation under which they are made, as in all other cases of contract, in the light of reason and with a view of carrying into effect the legislative intent. The exercise of the franchise was necessary to accomplish the object in view, and it was indispensable to enable the appellee to comply with its terms, and no individual or corporation would have invested such a large sum of money as is conceded was necessary, with the privilege on the part of the council to abandon its terms in part. * * * The contract with the corporation is as inviolable, and the rights to contract exists as with natural persons, and the city council of Newport, looking to the comfort and convenience of its population and the public welfare, has contracted with appellee to furnish gas for a fixed period. There is no pretense that any

of its provisions have been violated by the appellee or that it has any of the elements of fraud or mistake fatal to any contract, and, therefore, the law should recognize its validity and enforce its obligation."

In *New Orleans Gas Light Co.* v. *The City of New Orleans*, 42 La. Ann., 188, where the statute provided that

"The council shall have power, and it shall be their duty to pass such ordinances, and to see to their faithful execution, as may be necessary and proper, * * * to light the streets, wharves, landings and public squares."

The court say: "That clause of itself contains no limitation or restriction to the power therein conferred in general and sweeping terms. * * * By entering into a contract for more than one year for a commodity or other supply, the City Council is not amenable to the charge that it restricted its legislative power.

The power to legislate conferred on the city by its charter has reference to its authority to legislate for governmental functions, such as passing and enforcing ordinances to govern itself and others, under what is known as its police power; and it is distinct from the power to contract, which is similar in its effects to the right of contracting as exercised by natural persons. Hence, the rules of law and the principles settled in jurisprudence, which prohibit municipal corporations from legislating future restrictions to its own legislative power, are not applicable to a time contract entered into by such a corporation. * * * The rule as established by jurisprudence seems to be that, in the absence of special legislative prohibition or restriction, a municipal corporation, vested with a general power to make a contract for the supply of gas or any other commodity has the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise, including the power to make it for more than one year, if by thus contracting it believes that better terms or lower rates can be obtained.

After a thorough examination of our legislation on the subject, and an exhaustive study of our own reports, we find no law, reason or authority which would justify us in removing the present case from the effect of this general rule. * * *

When the power is once shown to exist in the municipal corporation courts are powerless to regulate its exercise or to dic-

tate what particular contract should or should not be made or justified."

And it was there held, in the absence of express authority, the city could make a valid contract at a fixed rate for a period of four years.

In *City of Memphis* v. *Memphis Water Co.*, 5 Heisk, 529, the court say:

"The nature of water works to supply a city and its inhabitants with water, falls naturally and legitimately within the powers of its charter of incorporation, and the exercise of this power, within the limit of its charter, needs no enabling act of the legislature."

The law relating to this case is nowhere more clearly stated than in *Blood* v. *Manchester Electric Light Co.*, 68 N. H., 340, 335, where the statute provided that a municipality could "make any contracts which may be necessary and convenient for the transaction of the public business of the town," the court say:

"No limitation is put upon this power in reference to the lighting of streets that does not pertain to it in reference to other subjects. A town has as complete power to contract for lighting its streets as for building its highways or other public works. The only limitation is the general one that the contract shall be 'necessary and convenient' for the transaction of the town's business. This is simply a declaration of the common law, applicable to all corporations, public as well as private, confining their powers to contract to those subjects which are necessary and proper to enable them to fulfill the object of their incorporation. The city councils of Manchester were authorized to exercise the powers of the corporation, namely, 'all the powers vested by law in towns or in the inhabitants thereof.' Pub. St. c. 50, § 1; Laws 1846, c. 384, § 14. This language excludes all ground for believing that the legislature intended to limit the authority of the councils so that they could not bind the corporation beyond the unexpired part of their term of office. The legislature would not leave such intention to be inferred from language which conveys no suggestion of

the limitation. The necessity for continuity in the operations of the government is a reason why there should be no such limitation. The agencies of the government change, but the government goes on without interruption. The authority of the city councils while in office being co-extensive with the powers of the city or its inhabitants, the limitation in their term of office is immaterial in the decision of the question under consideration. The contract stands the same as if it had been made by a vote of the inhabitants acting under a town organization.

It is claimed by the plaintiffs that a town cannot bind itself by a contract for a term of years, because it would disable the town from performing its legislative functions to their full extent for the time being. If this were so, a town's power to contract would be nominal, rather than real. It would not answer the requirements of its business. If a town could disregard its contracts at will on the ground that it has no power to bind itself beyond the moment employed in making them, people would be reluctant to enter into contracts with it. A person would not ordinarily risk his labor and money in ventures so precarious, certainly not unless the compensation corresponded to the risk. For example, if the city council of Manchester had been able to induce any one to light its streets for a time to be measured by their will, and to furnish the necessary apparatus and fixtures for so doing (which is exceedingly doubtful), they would have been able to do it only upon payment of a large price, much larger than would have been necessary if the time of the service was fixed by the agreement of the parties. Moreover, a service depending upon such a contract would be unreliable, and subject to constant interruptions, and would not meet the public needs.

The reason assigned for the disability alleged is not sound. In making contracts, a town or city does not act in its legislative capacity, but in what is termed for the sake of distinction, its private capacity. 1 Dill. Mun. Corp., § § 27, 39. In this capacity it resembles an individual or private corporation; and its contracts have the same binding force upon it that the contracts of individuals and private corporations have upon them. (*Greenland* v. *Weeks*, 49 N. H., 472, 480, *et seq.*; *South Hampton* v. *Fowler*, 52 N. H., 225, 231; *Small* v. *Inhabitants of Danville*, 51 Me., 359, 361), and are equally

protected by the Federal constitution from impairment by subsequent legislation on the part of either the state or the town. (*Fletcher* v. *Peck*, 6 Cranch, 87; *Gale* v. *Village of Kalamazoo*, 23 Mich., 344; *City of Indianapolis* v. *Indianapolis Gaslight & Coke Co.*, 66 Ind., 396, 26; *City of Valparaiso* v. *Gardiner*, 97 Ind., 1; *New Orleans M. & C. R. Co.* v. *City of New Orleans*, 26 La. Ann., 478, 481; *Philadelphia* v. *Fix*, 64 Pa. St., 169; *Western College* v. *Cleveland*, 12 Ohio St., 375, 377; 1 Dill. Mun. Corp., § § 66 *et seq.*, 116.) The city council in exercising the powers of the city could determine the kind of lights to be used for lighting the streets, their location, when they should be lighted, and all other details of the business. They had power also to determine the length of time a contract for lighting should continue, in view of the necessity and convenience of the service required. If they in good faith exercised the discretion lodged with them, their contract is a legal contract, and will bind the city the same as a similar contract made by the directors of a private corporation binds it. *Dibble* v. *Town of New Haven*, 56 Conn., 199, *Putnam* v. *Grand Rapids*, 58 Mich., 416, 419."

*Andrews* v. *National Foundry*, 10 C. C. App., 60, where the charter authorized the city "to provide for the erection of water works for a supply of water to the inhabitants of a city," the court held: "Such authority extended to any reasonable method" the city might adopt, and upheld a time contract made by the city for such supply.

While the question was not squarely in point, still the court in *Kimball* v. *City of Cedar Rapids*, 100 Fed. Rep., 802, held that the city was authorized under a statute authorizing cities to contract for water, to make a contract for a period of twenty-five years.

In *Santa Ana Water Co.* v. *Town of San Buenaventura*, 56 Fed. Rep., 339, the court says:

"The power conferred by the legislature upon the board of trustees of a municipality to provide for the prevention and extinguishment of fires and to provide the town with fresh water necessarily carried with it the implied power to make any

and all proper contracts to accomplish those ends. There was no constitutional inhibition against such grants of power, and it was, therefore, not only within the province of the legislature to make the grant, but, having deemed it wise to make of the town a municipal corporation, it was appropriate, and indeed necessary, that provision either be made directly by the legislature for the supply of the town and its inhabitants with fresh water, or that such power be delegated to the governing body of the municipality."

In *Fergus Falls Water Co* v. *City of Fergus Falls*, 65 Fed. Rep., 591, where a city was authorized "to contract * * * to supply the city with water," and the statute was silent as to the price or time, and a contract was made for thirty years at a rental of $80 per hydrant, the court held such contract valid, and says:

"The law does not favor the idea that a man shall abide by a contract when it is advantageous to him, and repudiate it when it becomes irksome. It is well settled that time and even exclusive contracts may be made by city authorities for the purpose of inducing persons to embark capital in such enterprises as water or gas works, and common sense and experience teach us that without such provisions capital would not be invested. * * * When the city received power from the legislature to contract for water works, the power to make necessary and proper arrangements to provide for the payment for the same was also granted."

In *Los Angeles City Water Co.* v. *City of Los Angeles*, 88 Fed. Rep., 720, speaking of a grant to supply a city with water, the court says:

"The words of the grant in the case at bar, 'power * * * to provide for supplying the city with water,' are clear and unambiguous, and, in my opinion, admit of no other reasonable construction than that they were intended to confer upon the City of Los Angeles, so far as concerns the means necessary to supply the city with water, powers as ample as the legislature itself possessed. This delegation of power to the city was not, of course, a relinquishment by the legislature of its control over the subject. The legislature could at any time revoke the

power delegated to the city and provide directly, through agencies of it own selection, for supplying the city with water, provided such revocation or provision should not impair any previously vested rights."

And after discussing the question whether or not such power is a business or proprietary power as distinct from a governmental or legislative power, the court further say:

"If, however, it be conceded, contrary to these authorities, and as claimed by defendants, that the power of a city to regulate water rates is legislative or governmental, the city may, by contract, abridge such power under an implied as well as an express legislative grant; and this rule is recognized by many of the authorities upon which defendants rely. Thus, in one of them, it is said:

'Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen, be delegated, so they cannot, without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.' * * * 1 Dill. Mun. Corp. (4th Ed.), § 97.

It is worthy of note that the words 'without legislative authority, express or implied,' are not found in the first three editions of Judge Dillon's work. I take it, therefore, that a review of the subject made by him subsequent to said editions satisfied him that the governmental as well as business powers of a city could be abridged by contract if there were legislative authority therefor, and that such authority could arise by implication as well as by express grant."

This case came to this court on appeal and was affirmed.

*Los Angeles* v. *Los Angeles City Water Works Co.*, 177 U. S., 558.

See, also,

*Westerly Water Works* v. *Town of Westerly*, 75 F. R., 181.

*Defiance Water Co.* v. *City of Defiance*, 90 F. R., 753.
*South West Mo. Light Co.* v. *City of Joplin*, 101 F. R., 23.
*Little Falls Elec. & W. Co.* v. *City of Little Falls*, 102 F. R., 663.
*Insular Water Co.* v. *Baltimore*, 13 C. C. App., 378.
*State ex rel.* v. *City of Great Falls*, 19 Mon., 518.
*State ex rel. City of St. Louis* v. *La Clede Gas L. Co.*, 102 Mo., 472.
*Livingston* v. *Pippin*, 31 Ala., 542.
*Rome* v. *Cabot*, 28 Ga., 50.
*Hale* v. *Houghton*, 8 Mich., 458.
*In re Pryor's Petition*, 55 Kas., 724.

Many other cases relating to powers of municipalities as to contracting for water works, which might be cited, clearly establish the doctrine that where a municipality is authorized to establish water works, either by itself or through the instrumentality or aid of third persons, this power confers upon them an express power under which, in its discretion as to the mode and manner they may make contracts, not only for a fixed period, but also for a fixed price for the entire period. That this is the construction to be placed upon the acts of the legislature of the State of Illinois seems to us to be fully expressed by the action of that body at the same session in not only recognizing the implied power of a municipality to construct works, but by two separate acts expressly impowering such body not only "to provide for a supply of water," but also "to make a contract for water at a price fixed by ordinance, and for a period of thirty years."

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These acts being passed at the same session of the legislature are *in pari materia*, and, should be construed together.

Potters Dwarris Statutes, 272.
Sedgwick Statute Law, 423.
1 Kent's Com., 463.
*Reiche* v. *Smythe*, 13 Wall., 162.
*Northern Trust Co.* v. *Palmer*, 171 Ill., 383.
*South Park Commissioners* v. *First National Bank*, 177 Ill., 234.

The courts have held that where a municipality has power to contract for a supply of water, that their discretion goes to such an extent that the city may, in consideration of furnishing the city with a free supply of water for municipal purposes, exempt such works from the payment of taxes for the full term of the contract.

*Grant* v. *City of Davenport*, 36 Ia., 396.
*City of Portland* v. *Portland Water Works*, 67 Maine, 35.
*Maine Water Co.* v. *City of Waterville*, 93 Me., 586.
*City of New Orleans* v. *New Orleans Water Works*, 36 La., 432.
*Ludington Water Supply Co.* v. *City of Ludington*, 119 Mich, 480.
*Utica Water Works* v. *City of Utica*, 10 Hun., 431.

This right of a municipal corporation to grant an exemption from taxation for a valid consideration at the time advanced, or to be thereafter performed, was recognized by this court as valid in *New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S., 650, where Mr. Justice HARLAN, delivering the opinion, cites numerous cases to that effect, and says :

"If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations, *it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law*—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies."

The principle is clearly stated in the *City of Livingston* v. *Pippen*, 31 Ala., 542, where the city was authorized to "pass all ordinances that shall be necessary for the security and welfare of the inhabitants thereof, and for preserving health," etc., and made a contract for building an artesian well. The point being raised that the city had no authority to make such contract, the court say:

"Nothing is more important as a sanitary and police regulation than an abundant supply of water. * * * The corporate authorities having the power to procure a supply of water, were themselves the judges of the *mode and manner* best calculated to accomplish that object."

Doubtless nnmerous cases will be cited in support of the proposition that the contract entered into under the ordinance of June 6, 1882, is invalid in so far as it attempts to bind the corporation as to the price of water beyond the term of the then members of the city council, but a careful examination of those cases will show that the doctrine contended for by us is the correct one; or, as stated in the case of *City of Indianapolis* v. *Indianapolis Gas Light and Coke Co.*, *supra*, when speaking of the authorities on this point:

"We think their main current supports the view we have taken in this opinion, nor do we think that upon principle they are seriously conflicting. The apparent conflict arises from applying the language *generally* when it was meant to apply only to *some particular* municipality."

G.

*The statute of 1891 should be construed to relate solely to such contracts as might thereafter be executed.*

We have elsewnere shown that the rights acquired by Nathan Shelton and assigns under the ordinance of June 6, 1882, became a vested right, at the time of entering into such contract.

Nathan Shelton and his assigns could rely upon the statutes as they then existed.

*Rowan* v. *Runnels*, 5 How., 134.
*Douglass* v. *County of Pike*, 101 U. S. 677.
*Louisiana* v. *Pittsburg*, 105 U. S.,278.

As was said in *Santa Anna Water Co.* v. *Town of San Buenaventura*, 56 F. R., 339, where speaking of the contract made between the city and Arnaz:

"Arnaz and his assigns were individual citizens. They were not in any way bound to enter into the contract with the board of trustees of the town. By the exercise of none of its prorogatives as a governing power, could the municipality compel them to do so. The contract required their assent as well as that of the board of trustees. Of course in entering into it, they did so subject to existing laws, but no then existing law has been pointed out, reserving to the state or the municipality the power to fix the water rates the town through its board of trustees contracted should be fixed by Arnaz and his associates."

"It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively."

Cooley on Con. Lim. (2d Ed.), 370.

See, also,

Morowitz on Cor., §1110.

"It is the general law, say the books, that no statute is to have a retrospection beyond the time of its commencement for the rule and law of parliament that *nova constitutio futuris formam debet imponere*, and not only is this the doctrine of the English law, that the statute is not to have a retrospective effect, but is also founded on principles of general jurisprudence. A retrospective statute would partake in its characteristics of the mischief of *ex post facto* law as to all cases of crimes and penalties; and in matters relating to contracts and property would violate every sound principle.

Potter's Dwarris, Statutes (Ed. 1871), 162.

*Sinking Fund Cases*, 99 U. S., 700.

*Douglas* v. *Kentucky*, 168 U. S., 488.

"The rule is that statutes are prospective, and will not be construed to have retrospective operation unless the language employed in the enactment is so clear it will admit of no other construction. *Guard* v. *Rowan*, 2 Scam., 499; *Marsh* v. *Chestnut*, 14 Ill., 223; *Deininger* v. *McConnell* 41 *id.*, 227; *Russell and Allison Drainage District* v. *Benson*, 125 *id.*, 490."

*Gage* v *Stewart*, 127 Ill., 207.

*Bauer Grocer Co.* v. *Zelle*, 172 Ill., 414 (and cases cited).

*Rowan* v. *Runnels*, 5 How., 134.

*Douglas* v. *Pike Co.*, 101 U. S., 677.

*Shreveport* v. *Cole*, 129 U. S., 36.

This statute does not in terms mention contracts theretofore entered into.

If the right to regulate rates already fixed under the statute was not reserved under the police power (and we have elsewhere shown it was not, *Infra*, p. 107), then a subsequent statute cannot change such right.

*Chicago* v. *Sheldon*, 9 Wall., 50 (and authorities, *infra*, p. 90)

H.

*The legislature having authorized defendant in error to make the contract of June 7, 1882, such contract must stand unless attacked for fraud.*

There is no allegation that fraud was used in the passage of this ordinance. There is no pretense that the contract was not entered into in the utmost good faith. There is nothing on which to found the belief that defendant in error was not as fully capable as plaintiff in error in ascertaining the reasonableness or unreasonableness of the rates which were established by the ordinance of June 6, 1882. There is no allegation in the pleas that plaintiff in error knew when it accepted such ordinance that the rates were unreasonable. Under well established rules of pleading, it is presumed that plaintiff in error did not know that such rates were unreasonable.

The fact that the parties acted under such contract for full fourteen years after it was made, and for five years after the act of 1891, authorizing the reduction of water rates, is pretty good evidence of its fairness.

There was no compulsion in entering into the contract. Defendant in error entered into the contract knowingly, and as such should be bound by its terms.

The legislature having authorized defendant in error to contract with Shelton, and it having so contracted, the courts are bound by such action unless such contract is attacked for fraud, which is not the case here.

Tiedeman on Mun. Corp., § 175.

Cooley on Con. Lim., **186–7.

15 Amer. & Eng. Ency. Law, 1046.

*New Orleans Water Works* v. *New Orleans*, 164 U. S., 481.

*Little Falls Electric Light Co.* v. *City of Little Falls*, 102 Fed. Rep., 663.

*Sherlock* v. *Village of Winnetka*, 59 Ill., 389.

*Dunham* v. *Village of Hyde Park*, 75 Ill., 371.

*Brush* v. *City of Carbondale*, 78 Ill., 74.

*Warren* v. *City of Chicago*, 118 Ill,, 329.

*City of Newport* v. *Newport Light Co.*, 84 Ky., 108.

*City of Memphis* v. *Memphis Water Co.*, 5 Heisk., 529.

In *Godson* v. *Winchester, etc.*, 12 Bush., 114, the court say that where a

"Grantee becomes bound by an express or implied undertaking to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be, for the legislature being vested with power to make grants of that character, when the public convenience demands it, the legislative judgment is conclusive, both as to necessity for making the grant, the amount of service to be rendered, and the courts have no power to interfere, however, inadequate the consideration or unreasonable the grant may appear to them."

Speaking of a somewhat similar ordinance, the court, in *VonReipen* v. *Jersey City*, 58 N. J. Law, 262, say:

"In absence of fraud or palpable abuse of discretion on part of municipal authorities, the only question for judicial cognizance is, whether there has been any violation of legal principles in entering into the engagement."

There is neither charge of fraud on part of plaintiff in error in entering onto this contract nor palpable abuse of discretion on part of the defendant in error, and the ordinance should stand.

I.

It will be argued here, undoubtedly, as below, that the ordinance of June 6th, 1882, granting an exclusive privilege, is a monopoly, therefore plaintiff in error is not entitled to the protection of this court.

It has frequently been held that a contract or ordinance granting the exclusive right to furnish gas or water is not unconstitutional, and is not a monopoly.

*New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S., 650.

*St. Tammany, etc.*, v. *N. O. Water Works*, 120 U. S., 64.

*Memphis* v. *Water Co.*, 5 Heisk, 529.

*B. & L. P. F. Co*, v. *Hawkey*, 31 Md., 339.

*Des Moines, etc. Co.* v. *Des Moines, etc., Co.*, 73 Ia., 573.

*Indianapolis Cable St. Ry. Co.* v. *Citizens' Street Ry. Co.*, 127 Ind., 369.

*Bartholomew* v. *City of Austin*, 29 Cir. Ct. App., 568, and cases already cited.

Unless limited by its constitution, the legislature may grant an exclusive license.

*New Orleans Gas Co.* v. *New Orleans Light Co.*, 115 U. S., 650.

*St. Tammany, etc.*, v. *New Orleans Water Works*, 120 U. S., 64.

Even if the ordinance of June 6th, 1882, were invalid, to the extent of granting an exclusive license, such fact did not render the remainder of the ordinance invalid, and the remainder of the ordinance will stand.

*Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill., 390.

*Bank of Hamilton* v. *Dudley*, 2 Pet., 492.

*Keokuk Packet Co.* v. *Keokuk*, 95 U. S., 80.

*Florida Cent. R. R.* v. *Schutte*, 103 U. S., 118.

*Town of Unity* v. *Burrage*, 103 U. S., 447.

*Vial* v. *Penniman*, 103 U. S., 714.

*Hills* v. *National Albany Exchange Bank*, 105 U. S., 319.

*Evansville Nat. Bank* v. *Britton*, 105 U. S., 322.

*Presser* v. *Illinois*, 116 U. S., 252.

*Baldwin* v. *Franks*, 120 U. S., 678.

*Little Rock, etc. R. R.* v. *Worthin*, 120 U. S., 97.

*Field* v. *Clark*, 143 U. S., 649.

*Reagan* v. *Farmers L. & T. Co.*, 154 U. S., 362.

*Pearsall* v. *Great Nor. R. R. Co.*, 161 U. S., 647.

Even if the ordinance of June 6, 1882, was invalid to the extent of granting an exclusive license, still, defendant in error having enjoyed and received the uses and benefits derived from the water furnished it, is liable therefore under a *quantum meruit*.

See authorities, *supra* p. 37.

Such question, therefore, does not arise, and should not enter into consideration in determining this case.

J.

In so far as the case of the *City of Danville* v. *Danville Water Works*, 178 Ill., 299 (and on the strength of which the present case was decided in the court below), holds to the contrary, it is opposed to the great weight of authority.

A careful examination of the Danville case, will further show that it is not founded on good reasoning.

On June 6, 1891, the legislature of the State of Illinois passed an act, providing:

"That the corporate authorities of any city, town or village, now or hereafter incorporated under any general or special law of this state, in which any individual, company or corporation has been, or hereafter may be, authorized by such city, town or village to supply water to such city, town or village, and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, and such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the Circuit Court of the county in which such city, town or village may be."

In the Danville case, the court relied largely upon the reasoning in the case of the *City of Carlyle* v. *Carlyle Water, Light & Power Co.*, 52 Ill. App., 577. That suit was for money due for rentals of hydrants under an ordinance which had been passed in September, 1887. In May, 1888, the city passed another ordinance which was not accepted by the Water Works Company. No water had in fact been furnished the city under the ordinance of 1888. This latter ordinance was passed three years prior to the passage of the act of 1891. The only question in that case, therefore, was whether or not a city was liable for water furnished and used by the city. That

a city is liable in assumpsit for water furnished at its own request, and is used by it, is well established.

The rights of the plaintiff in the *Carlyle* case accrued prior to the passage of the act of 1891; the construction of that act could not by any possibility come before the court, and its remarks found in that opinion relative to that act are mere *obiter dicta.*

In the *Carlyle* case, the court also based its decision upon the doctrine that municipalities could not, by contract, bind their successors, and rely upon the two cases of *East St. Louis* v. *East St. Louis Gas Light and Coke Co.*, 98 Ill., 415, and *Milliken* v. *County of Edgar*, 142 Ill., 528.

In the case of *East St. Louis Gas Light and Coke Co.* v. *City of East St. Louis*, the gas company was authorized by charter to make a contract for thirty years, but the charter of the City of East St. Louis, however, gave it no *express* authority to make what are called long-time contracts. It was, therefore, held that the city could not, by contract, under its implied powers, bind its successors.

In *Milliken* v. *County of Edgar*, there being no express authority in the county board of supervisors to make a contract for a longer time than one year, it was held that they could not, under their *implied* power, make a contract to employ a keeper of the poor-house for a term of three years or beyond the term of their office.

All that was decided in the *East St. Louis* or the *Milliken* case was that neither a city council or county board could, under their implied powers, make a contract which would be binding on their successors.

The Appellate Court, in the *Carlyle* case, entirely overlooked and ignored the distinction between *express* and *implied* powers. The doctrine of repudiation stated in the *East St.*

*Louis* and *Milliken* cases is based on the want of authority arising under the *implied* powers of a municipal corporation. The court does not attempt to discuss or say what the effect would have been if the municipal body had been granted *express* power by the legislature.

(2) We discuss and show later that the provisions of section 9 of the incorpoartion act do not affect the case at bar. (*Infra*, p. p. 93.)

(3) The court, in the Danville case, in addition to the foregoing cases, relied upon the cases of *Gale* v. *Kalamazoo*, 23 Mich., 354; *Des Moines* v. *Des Moines Water Works*, 95 Ia., 357; and *Spring Valley Water Works* v. *Schlottler*, 110 U. S., 347.

In the *Gale* case, an ordinance was passed giving the plaintiff the right to erect a market, to confine the marketing of the citizens, during the market hours, to the building and its vicinity, to appoint a proper officer for the enforcement of all by-laws and ordinances relative to the market and to the vending of market articles, and *to control the rents of the stalls for the benefit of the plaintiff*. The court, COOLEY, J., there say:

"The contract in question, however, is not only entered into in pursuance of an exercise of legislative authority on the part of the village, but it undertakes to control that authority in several important particulars.

It requires the appointment of a competent manager or clerk to attend to or supervise the market house and to require the observance of the ordinances and bi-laws relative to the marketing within the village. *For this purpose legislative action would have been essential*, and must, consequently, have been within the contenplation of the parties when the contract was made."

As was stated by BIDDLE, J., in the case of *City of Indianapolis* v. *Indianapolis Gas Light & Coke Co.*, 66 Ind., 396, at page 405, when commenting on the Gale case:

"It is apparant, in this contract, that the Village of Kalamazoo parted with its legislative and administrative power over the market house in several essential respects. In the language of COOLEY, J., 'Not only was the marketing to be confined to one locality, but the *plaintiff was to have an unlimited right to control the occupation of the market-prices through the power given him to determine the rents to be paid by the lessees*' This vested in him a practical monopoly of the public market. The vice of this contract lay, not in the agreement to have a market house built, but in the fact that the public authorities had undertaken to part with their control over it, when built. and place its management in the power of private speculation. This they could not do."

An entirely different rule and principle prevails where, as at bar, *the city itself*, in its legislative capacity, *determined the water rates* by ordinance and not leaving such rate to be determined by the capriciousness of the grantee.

An examination of the *Des Moines case* will show that the contract was made in 1871 for the erection of the water works. The city passed an ordinance amending the water rates in the year 1883. This amended ordinance was, in fact, *accepted by the water company* and acted upon by *both parties* until the year 1893. A dispute then arose between the city and the water company in reference to the construction of that part of the ordinance of 1883, providing *as to the manner of ascertaining* the water rates by *arbitration* in the case of disagreement. The point decided in that case was as to the construction of the terms of the ordinance of 1883. That is, whether the ordinance of 1893 was passed in accordance with the principles of that ordinance of 1883.

In the *Spring Valley Water Works* case the constitution of California, adopted in 1849, *prohibited one legislature from bartering away the power of successive legislatures to control the administration of private corporations* from under the laws of the state, and the statutes expressly provided that the water

rates to be charged should be "reasonable," and be determined, in case of differences, by arbitration. The Spring Valley Works had notice of this constitutional requirement when it accepted the privileges under the act of 1858, under which it was organized. A different question from the case at bar, where there is no inhibition in the constitution of the State of Illinois to prevent the legislature from passing any statute it thought best. In neither the *Gale*, *Des Moines* or *Spring Valley* case did the question of the *power* of the city arise in a case where it is expressly authorized by statute, as here, to make a contract for water for a definite time.

In the case of *The State* v. *Columbia Gas Light Co.*, 34 Ohio, State, 572 (also referred to in opinion in the Danville case), the charter was silent as to the price at which the gas was to be sold. The court held that under the *implied* powers there was no evidence of intention of the state to surrender its right to control such price.

The court, in *Zanesville* v. *Gas Light Co.*, 47 Ohio State, 1 (also referred to in said opinion), simply followed the *Columbus* case.

(4) The other authorities referred to in the Danville case (on page 312, 178 Ill.)—Greenhood on Public Policy, p. 317; Cooley's Constitutional Limitations, p. 206; 15th Amer. & Eng. Ency. Law, p. 1045, and Dillon on Municipal Corporations, p. 443—relate to powers arising under *implied* powers and not under express powers. They are not authorities upon the question arising under a power expressly authorizing the city to provide for a supply and fix the price of water by ordinance as in the case at bar.

(4) The better reasoning in the Danville case is contained in the opinion of Mr. Justice Phillips, who, with two other of the judges, dissented. (178 Ill., p. 316.)

## II.

### A.

*The ordinance of February 10, 1896, is in violation of the provisions of section 10 article 1, Constitution of the United States.*

(1) Nathan Shelton acquired all the rights and benefits under said ordinance, one of which, to-wit, the rates as "established by ordinance," were to continue as to him and his assigns for the full term of thirty years. The legislature of the State of Illinois, nearly nine years after the completion and erection of said system of water works, passed the act of June 6, 1891. Acting under and pursuant to such statute, defendant in error on the 10th day of February, A. D. 1896, passed an ordinance whereby it was provided that the annual rental to be paid for fire hydrants then in use by defendant in error, or which might thereafter be ordered as provided in said ordinance, should be at the rate of $50 per hydrant (Rec. 19, Sec. 2) instead of $100 for the first 100 and $80 for the next 50, and $50 for all over 150. (Rec. 9, Sec. 7.) In addition the ordinance (Rec., 10, Sec. 9; Rec. 20, Sec. 3 & 4) reduced the water rates to be charged to citizens from 10 to 60 per cent.

Such action of the common council of defendant in error, under the authority of the act of the legislature of 1891 has been repeatedly held to be the act of the state itself.

*New Orleans Water Co.*, v. *Louisana Sugar Ref. Co.*, 125 U. S., 18.

*New Orleans Water Co.*, v. *City of New Orleans*, 164 U. S,, 481.

*City Ry. Co.*, v. *Citizens St. Ry. Co.*, 166 U. S., 557.

(2.) Nathan Shelton, on August 8th, 1882, after he had accepted the obligations and provisions of the ordinance of June 6th, 1882, for a valuable consideration, transferred to plaintiff in error all his rights and interests under said contract, and in all rents, benefits and advantages to accrue therefrom, subject to all duties and obligations imposed in and by such ordinance.

The ordinance was passed upon the understanding that the rights acquired thereunder by Shelton might be assigned. In every place mentioned in the ordinance wherein the name Nathan Shelton is mentioned, is added thereto the words: "or his assigns." The defendant in error on December 18th, 1882 (and within the time fixed by the ordinance), accepted said system of water works from plaintiff in error as assignee of Shelton, as in and for full compliance with the terms thereof.

It is well settled that such ordinances are assignable, and the assignee is entitled to all the rights and benefits thereunder, and subject to all the duties and obligations thereof. Indeed this is not controverted.

2 Dillon Mun. Cor. 691.

*New Orleans Gas Light Co.*, v. *Louisiana Light & Heat Co.*, 115 U. S., 650.

*Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S., 558.

*Santa Ana Water Co.* v. *Town of San Buenaventura*, 56 F. R. 339.

*Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 F. R., 663.

*State ex rel City of St. Louis* v *La Clede Gas L. Co.*, 102 Mo., 472.

In *re Pryor*, 55 Kas., 724.

(3.) Corporations are persons and within the provisions of the Federal Constitution, equally with individuals.

*Mo. Pac. Ry. Co.* v. *Macky*, 127 U. S., 210.

*Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S., 26.

*Charlotte* v. *Gibbs*, 142 U. S., 386.

*Smythe* v. *Ames*, 169 U. S., 522.

*Blake* v. *McClurg*, 172 U. S., 259.

(4.) The written acceptance of Nathan Shelton required by the ordinance was filed with the clerk of the City of Freeport on the 7th of June, 1882. Said ordinance, therefore, became and was binding as a contract between defendant in error and Shelton and his assigns, on the 7th day of June, 1882.

That defendant in error had power to execute such contract, we have already shown. If defendant in error had power to execute such contract, then it was not within the power of the legislature of the State of Illinois to pass an act imparing the obligation of such contract upon its acceptance, because it then became a vested right.

Even where an ordinance is repealed, such repeal cannot operate retrospectively to impair private rights vested under it.

Dillon on Mun. Cor., § 314.

Thompson on Cor., § 5413.

Tiedeman on Police Power, § 188.

Says Mr. Justice STRONG, in the Sinking Fund cases, 99 U. S., page 700:

"There is no technicality about vested rights. Most of them grow out of contracts, and no matter how they arise, they are all equally sacred; equally beyond the reach of legislative interference. A vested right of action is property in the same sense in which rights to tangible things are and equally pro-

tected. Whether it springs from contract or from other rules of the common law, it is not competent for the legislature to take it away."

In *Pacific Mail Steamship* v. *Joleffe*, 2 Wall., 450, Mr. Justice FIELD says:

"When a right has arisen upon a contract or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of a statute does not affect it, or an action for its enforcement. *It has become a vested right, which stands independent of the statute.*"

Where the right of repealing, amending or revoking is reserved, the state may exercise such reserved power, but, as was said by Mr. Justice FIELD, in *Tomlinson* v. *Jessup*, 15 Wall., 454.

"Rights acquired by third parties, and which have become vested under the charter in the legitimate exercise of its powers stand upon a different footing."

In *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S., 673, Mr. Justice BROWN says:

"A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an immediate fixed right of present or future enjoyment;' and by Chancellor Kent as 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent Com., 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction of being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.'"

In *Holyoke Water Power* v. *Lyman*, 15 Wall., 500, where the right to repeal, alter or revoke a charter was reserved, the court (Mr. Justice CLIFFORD), says:

"Vested rights, it is conceded, cannot be destroyed or impaired under such a reserve power."

And the right to repeal, alter or revoke is limited so that it

will not destroy or substantially impair the object of the grant, or any rights which have become vested under it.

The amendment must "not defeat or substantially impair the object of the grant, or any right under it."

*Close* v. *Glenwood Seminary*, 107 U. S., 466.

In *Douglas* v. *Kentucky*, 168 U. S., 488, in passing upon a repealing statute, Mr. Justice HARLAN, in delivering the opinion of the court, says approvingly:

"If rights have been acquired, or liabilities incurred, upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant before the passage of the repealing law, then, to the extent of such rights at least, the law must be regarded as unconstitutional and inoperative."

In *Com.* v. *Essex Co.*, 13 Gray, 253, Chief Justice SHAW says:

"Where under power in a charter rights have been acquired and become vested, no amendment or alteration can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

The right reserved under the constitution as to impairment of contracts relates to contracts between states and individuals, or contracts executed under the authority of the state with individuals, equally as well as to contracts between individuals.

(5) "The obligation of a contract is the law which binds a party to perform his agreement."

*Walker* v. *Whitehead*, 16 Wall., 318.

"A contract between a state and an individual is as obligatory as any other contract."

*Piqua Bank* v. *Knoop*, 16 How., 369.

In *Van Hoffman* v. *Quincy*, 4 Wall., 535, the court says:

"Where a state has authorized a municipal corporation to contract * * * the power thus given cannot be withdrawn until the contract is satisfied. The state and corporation are equally bond."

(6) Says Mr. Chief Justice MARSHALL, in the case of *Fletcher* v. *Peck*, 6 Cranch, 87, where a grant was made of certain land by act of the legislature of Georgia, and in a suit for breach of contract by a grantee under a deed it was set up, among other things, that the legislature had repealed the act granting the lands to the vendor:

"The principle is, that one legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the power of succeeding legislatures. The correctness of this principle, so far as affects the general legislature, can never be controverted.

If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made. Those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still, that they originally vested is a fact and cannot cease to be a fact. When, then, a law is in its nature a contract, a repeal of the law cannot divest those rights."

Speaking of the principle decided in *Fletcher* v. *Peck*, the court (Mr. Justice WASHINGTON) in *Greer* v. *Biddle*, 8 Wheaton, 86, says:

"The principles laid down in that case are that the Constitution of the United States embraces all contracts executed or executory, whether between individuals or between a state and individuals, and a state has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals."

Speaking of the provision of the Constitution as to impairing the obligation of contracts, Mr. Justice DANIELS says, in *West River Bridge Co.* v. *Dix*, 6 How, 523:

"The language and meaning of the inhibition were designed

to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and, therefore, inconsistent with and violative thereof."

In *The Trustees for Vincennes University* v. *State of Indiana*, 14 How., 277, where the trustees of the university acquired certain lands from the state, which the legislature subsequently sought to take away, the court say:

"The complainants, by accepting and exercising their corporate powers, acquired certain rights and made certain contracts which could not be impaired by the legislature."

In *Chicago* v. *Sheldon*, 9 Wall., 50, Mr. Justice NELSON says:

"A contract having been entered into between the parties, valid at the time by the law of the state, it is not competent even for its legislature to pass an act impairing this obligation, much less could any decision of its courts have that effect."

The principle is the same whether private or under a general law.

"Private charters, or such as are granted for the private benefit of the corporators are held to be contracts because they are based for their consideration upon the liabilities which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired, without the assent of the corporators than any other grant of property or legal estate unless the right to do so is reserved in the act of incorporation or in some general law of the state which was in operation at the time the charter was granted."

*Pennsylvania College Case*, 13 Wall., 190.

In *New Jersey* v. *Yard*, 95 U. S., 104, the legislature required the written acceptance of its act within sixty days, or if not accepted, such ordinance was to become void. The court (Mr. Justice MILLER) there says:

"It does seem as if the legislative intention was to make a

contract in the same manner and on the same terms of equal obligation as other contracts are made, and not to pass a statute which it could repeal or amend the day after it was signed by the parties."

In *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S., 647, Mr. Justice BROWN, delivering the opinion of the court, after discussing the *Dartmouth College Case*, 4 Wheat., 518, says that

"Subsequent cases have settled the law that wherever property rights have been acquired by reason of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation."

And after reviewing many of the cases which have come before this court, says, at page 675:

"Nor do we undertake to say that the legislature may not, in the exercise of a wise forethought, and for the purpose of directing capital to enterprises of doubtful profit, authorize the granting of monopolies for a limited time irrevocable by subsequent legislature."

That case was decided upon a statute which, subsequent to its charter, but before acceptance thereof, changed a right as against public policy.

In *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9, Mr. Justice BROWN says:

"This court has too often decided, for the rule to be now questioned that the grant of a right of way to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650, 660; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S., 674; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S., 64; *Crescent City*

*Gas Light Co.* v. *New Orleans Gas Light Co.*, 27 La Ann., 138, 147."

In *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S., 558, the court, Mr. Justice McKenna, delivering the opinion, adopts the language of the Supreme Court of California in the case when before that court (61 Calif., 65), and says:

"The City of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claims, the privilege of introducing, distributing and selling water to the inhabitants of that city, on certain terms and conditions which defendant has complied with, and *it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to exercise the rights and privileges granted.*"

See, also,

*The Dartmouth College Case*, 4 Wheat., 518.

Says the court in the recent case of *Los Angeles City Water Co.* v. *City of Los Angeles*, 103 F. R., at page 734:

"It is a self-evident proposition that it takes at least two parties to make a contract, and it is equally plain that, as long as it exists at all, all parties are bound by its provisions. The fact that one of them is a municipal corporation in no manner alters the case. In *Meyer* v. *Brown*, 65 Cal., 589, the court said: 'It is well, occasionally, to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other.'"

In *Winter* v. *Jones*, 10 Ga., 190, when construing the effect of a subsequent act of the legislature, the court say:

"All commentators and all the adjudicated cases upon constitutional law agree upon these undisputed propositions, that the objection to a law on the ground of its impairing the obligation of a contract, does not depend upon the extent of the change which the law may make in it.

That any deviation from its terms *which may impose conditions not expressed in the contract, however minute and ap-*

*parently immaterial in their effect* is within its constitutional limitation.

That a constitutional act of the legislature which is equivalent to a contract when performed, is a contract executed, and whatever rights are thereby created a subsequent legislature cannot impair" (citing *Fletcher* v. *Peck*, 6 Cranch, 87, and numerous other cases in this court.

In *Crosby* v. *City Council of Montgomery*, 108 Ala., 498, an agreement was entered into with the water company in 1885. In February, 1887, the legislature passed an act authorizing the city to regulate water rates. In 1889 the city passed an ordinance changing the rates.

The court, in discussing the effect of such ordinance, says:

"The city cannot by pretended exercise of its police power or power to regulate water rates prohibit a contracting party from the exercise of every right and claim provided for in his contract, and which the parties had the right to provide at the time, nor had the city authority by ordinance to change the terms of the contract without consent of the other party."

Indeed, it would be but a work of reiteration and useless task to cite and quote the numerous cases which have come before this and other courts involving that part of the Federal constitution inhibiting laws against the impairment of contracts. What apparent exceptions there may be arise by reason of some power reserved in the statute subject to which the rights of the grantee were acquired.

None of these exceptions apply to the case at bar.

B.

*The right to repeal or amend the contract of June 7, 1882, was not reserved by the state.*

(1) It will doubtless be contended here as below that because plaintiff in error was a corporation organized under the General Incorporation Act of the State of Illinois, and because section 9 of that act provides that

"The General Assembly shall at all times have power to prescribe such *regulations and provisions* as may be deemed advisable, which *regulations and provisions* shall be binding on any and all corporations formed under the provisions of this act"

(Starr & Curtis' Statutes, p. 1006.), that, therefore, when the legistature afterwards in 1891, passed the act authorizing municipal authorities to establish and revise new water rates, the rights and obligations of the contract which were in good faith acquired by plaintiff in error prior thereto became modified by reason of the ordinance of February 10, 1896.

Such contention is fallacious, for three reasons:

First.—Said section 9 of the corporation act refers solely and only to such *regulations* and *provisions* as may apply to corporations as a class, and not to specific acts which interfere with the internal or business management of such corporations.

This section of the statute does not reserve the right to amend, alter or repeal the charter of the corporations organized under such statute. The provisions are simply "to prescribe such regulations and provisions" as the General Assembly may, from time to time, deem advisable. The "regulations and provisions" in this statute were inserted, not for the purpose of amending, altering or repealing the charter of a corporation or revoking contracts that might be lawfully entered into by such corporation.

The legislature has frequently given its own construction of this provision as to "regulations and provisions" in frequently passing statute amending the general incorporation act.

We find regulations and provisions such as relating to the increase of capital stock; changing the name of the corporation; changing the object or purpose of the corporation; changing

the number of directors; consolidating with other corporations; manner of calling stockholders' meetings; manner in which corporations can be wound up or proceedings had or taken by creditors and others against the corporation or stockholders; (Hurd's Statutes, 1899, Chap. 32), requiring all corporations to make annual reports to the secretary of state; requiring such corporations to forward the secretary of state affidavits that such corporation is not connected with trusts; forbidding corporations to unite in or form a trust, etc., and, generally, all those classes of acts which control the relation existing between stockholders as individuals and the corporation as an entirety, and the relations between corporations and third persons—that is, the manner of carrying on their business or exercising the powers of a corporation, but it was not contemplated under the terms, "regulations and provisions" of that act to interfere with the internal business management of the corporation itself.

It will not be contended for a minute that under such regulations and provisions a statute could be enacted which would regulate the price of coal sold by a corporation or the price of pig iron manufactured by another corporation, or any of the articles of commerce or other commodity dealt in by corporations, which would affect a corporation and not in a like manner affect individuals. Water is a commodity which requires no greater or special protection of the legislature than coal, wheat or any other commodity. Under such "regulations and provisions" undoubtedly the legislature or the municipality acting as its agent would have the right to pass regulations and provisions preventing the furnishing of impure water, the hours within which such water could be used for sprinkling purposes on private lawns, etc., the delivery of water to private hydrants, cleaning sinks, etc., and all kindred acts which relate to the manner of the supply and character as well as use

of the water, and which are necessary for the regulation of the public use thereof, but not for the price.

As was said in *New Orleans Water Works Co.* v. *Rivers*, 115 U. S., 674:

"Notwithstanding the exclusive privileges granted to the plaintiff the power remains that the municipal government of New Orleans, acting under legislative authority, required such regulations as will secure to the public uninterrupted use of the streets, as well as to prevent the distribution of water unfit for use, and to provide for such a continuous supply in quantity as protection to property, public and private, may require."

And such right is expressly reserved in the statute of April 10, 1872.

But here the words "regulations and provisions," as contained in section 9, added nothing to the law governing the internal or business management of corporations, save only such as might become necessary as to the *manner* or character in which the business of such corporation should be carried on, but not for the purpose of amending, altering, repealing or revoking its charter or contracts entered into by reason thereof.

Second.—Suppose Shelton had not assigned his contract to plaintiff in error, or had assigned all his rights under such ordinance to a third person, instead of a corporation, and such third party had performed and carried out the terms of the contract, as it is admitted was done by plaintiff in error; or, suppose such assignment had been made by Shelton to a co-partnership composed of two, twenty or more individuals, and such individuals or co-partnership were now the owners of the rights and benefits, under such ordinance, as the assignees of Shelton.

Would it be contended, for a moment, that section 9 of the corporation act could effect either Shelton or any such person

or partnership, as the case might be? The statement of the proposition is its own answer.

If Shelton had not assigned voluntarily, and had continued to carry out and perform the covenants of his contract up until the time of the passage of the ordinance of February 10, 1896, and had then died, no question could arise that such contract would not have passed, by operation of law, to his legal representatives. Under such circumstances section 9 of the incorporation act would not apply. What is the difference whether the assignment was made by Shelton by his voluntary act or by operation of law, or made to an individual or set of individuals, or to a corporation impowered by law to act?

Third.—The statute was not intended to apply in one case and not in another under similar conditions.

If such were the effect of the statute, the law would not be uniform in its operation. Such act would be class legislation, and would be unconstitutional. It must be presumed that the legislature had no intention to pass class legislation. Under section 23 of article 4 of the constitution of Illinois of 1870, the legislature was forbidden to pass any special legislation.

1 Starr & Curtis Stat., 134.

And it has been frequently held in Illinois that laws which are not uniform in their application are not constitutional.

*Ry. Co.* v. *Jacksonville*, 67 Ill., 37.
*People* v. *Cooper*, 83 Ill., 585.
*Hawthorn* v. *People*, 109 Ill., 302.
*Eden* v. *People*, 161 Ill., 296.
*Lappman* v. *People*, 175 Ill., 101.

"Class legislation discriminating against some and favoring others is prohibited."

Mr. Justice FIELD in *Barber* v. *Connelly*, 113 U. S., 27.

This was recognized in the case of *Illinois Central R. R. Co.* v. *City of Bloomington*, 76 Ill., 447, where Justice WALKER says:

"If, then, such burdens cannot be imposed upon a natural person, why, or by what reasonable means, can it be required of an artificial person? When brought into existence, these bodies are created persons, so far as to become amenable to the same burthens in support of the government, by taxes and the like, as natural persons coming into and subject to the government. But they are only liable to the performance of such duties, to the same extent, on the same terms and conditions, as natural persons. The legislature can exact of them no greater or higher duties than it can of natural persons, unless the right is reserved in their charters, or by some law that enters into their charters. One of the fundamental principles upon which all good government is constructed and is administered, is equality of burthens and protection. Any other principle is unjust and oppressive."

This identical question was considered by this court in *San Diego Land Co.* v. *National City*, 174 U. S., 749, where Mr. Justice HARLAN says:

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States: and in so far as it is thus deprived, *while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.*"

In *Williams* v. *Mississippi*, 170 U. S., 225, Mr. Justice MCKENNA, delivering the opinion of the court, quotes approvingly from *Yick Wo* v. *Hopkins*, 118 U. S., 356, and says:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination

in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.* This principle of interpretation has been sanctioned in *Henderson* v. *Mayor of New York*, 92 U. S., 259; *Chy Lung* v. *Freeman*, 92 U. S., 275; *Ex parte Virginia*, 100 U. S., 339; *Neal* v. *Delaware*, 103 U. S., 370; and *Soon Hing* v. *Crowley*, 113 U. S., 703."

Clearly, it was not intended by section 9 of the incorporation act to impose one burden upon corporations supplying water to cities and another and different burden on individuals supplying water under similar circumstances.

(2) That the act of 1891 was not intended in any wise to affect or modify powers of corporations, is shown by the title of the act.

Under section 13 of article 4. of the Constitution, it is provided,

"No act hereinafter passed shall embrace more than one subject, and that shall be expressed in the title. * * * And no law shall be revived or amended by reference to its title only,"

Starr & Curtis Stat., 125.

The act relating to corporations is entitled "An Act concerning Corporations", and all amendments to such act, or affecting corporations, refer directly to corporations. (Starr & Curtis Stat., 988–1063). The title of the act of 1891 is "An Act to enable cities, towns and villages incorporated under any general or special law of this state, to fix the rates and charges for the supply of water furnished by any individual, company or corporation, to any city, town or village. and the inhabitants thereof." (Laws 1891, p. 85). No reference is made to any statute in such enactment, to the corporation act or any amendment thereto, and it was not intended to affect powers or duties of a corporation. It was intended to apply to corporations to the same extent as individuals, and no further, and was not intended to apply to corporations because of the simple fact that such company was organized under the general corporation act when it would not, under the same circumstances, apply to an individual. The act, in fact, which authorizes cities to regulate water rates has no more connection with the act relating to corporations, and the amendments thereto, than has the general appropriation act which was passed at the same session of the legislature.

(3.) There is nothing in the constitution or statutes of the State of Illinois by which power to alter, amend, revoke or repeal is reserved to the legislature of the State of Illinois.

It is well known that such provisions are now inserted in the constitutions and statutes of many states, and that these provisions arose by reason of the remark of Mr. Justice STORY, in the Dartmouth case, that, to overcome the effect of the doctrine announced in that case, such reservations should be inserted in the charter.

Says Mr. Justice MILLER, in *Greenwood* v. *Union Freigh R. R. Co.*, 105 U. S., at page 13:

"It was, no doubt, with a view to suggest a method by

which the state legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice STORY in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales* v. *Stetson*, 2 Mass., 146.

It would seem that the states were not slow to avail themselves of this suggestion."

In Morowitz on Cor. §1108, it is said:

"A reservation of power to repeal, alter or amend the charter is usually expressed in the most explicit terms."

Had there been a provision, either in the constitution of the State of Illinois, or in the statute relating to corporations, whereby the state reserved to itself the right to revoke, alter or amend the charter granted to plaintiff in error, then there might possibly be some ground for the contention that in accepting the contract between Shelton and defendant in error, the plaintiff in error took such contract, with the reserved power on the part of the legislature to amend, alter, revoke or repeal the whole or any part of the power to be exercised by plaintiff in error as a corporation organized under the laws of the State of Illinois, but it did not do so.

But even then it could pass no act which would abrogate contract rights lawfully entered into under existing laws.

The principle is the same whether such question arises under a private charter or public law.

"Private charters are such as are granted for the private benefit of the corporators, are held to be contracts because they are based for their consideration upon the liabilities which the corporators assume by accepting the terms therein specified, and the grant of the franchise can no more be resumed by the

legislature, or its benefits diminished or impaired without the assent of the corporators than any other grant of property or legal estate unless the right to do so is reserved in the act of Incorporation, or in some general law of the state which was in operation at the time the charter was granted." *Pennsylvania College Cases*, 13 Wall, 190.

"But where the legislature steps in and provides a maximum of charges, *it operates upon this corporation the same that it does upon individuals engaged in a similar business.* It was within the power of the company to call upon the legislature to fix permanently this limit and make it a part of the charter, and if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference; but it was not, and the company invested its capital relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation."

*Chicago B. & Q. Railroad Co.* v. *Iowa*, 94 U. S., 155.

In *Currran* v *State of Arkansas*, 15 How., 304, Mr. Justice CURTIS held that the state in revoking a charter of the bank could not impair or destroy the obligations or contracts of the bank.

In the case of *Close* v. *Glenwood Cemetery*, 107 U. S., 466, Mr. Justice GRAY, delivering the opinion of the court, when speaking of the Holyoke Dam case, says:

"The legislature, under the provisions reserved to amend, alter or repeal a charter, may ~~revoke~~ make any alteration or amendment 'which will not defeat or substantially impair the object of the grant, or any rights vested under it.'"

In *Georgia R. R.* v. *Smith*, 128 U. S., 174, Mr. Justice FIELD, delivering the opinion of the Court, says, when construing a charter of a railroad:

"It is conceded that a railroad corporation is a private corporation, though its uses are public and that a contract em-

bodied in terms in its provisions or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject to its own control up to the limit designated, *exemption from legislative interference within that limit will be maintained.*"

The court had this doctrine in mind in the late case of *Lake Shore*, etc., *Ry.* v. *Smith*, 173U S., 684, where the legislature of Michigan, under its reserved police power, passed a statute compeiling the railroad company to issue mileage tickets at the rate of 2 cents per mile, and where Mr. Justice PECKHAM says:

"*If unhampeved by contract*, there is no doubt of the power of the state to provide for maximum rates of charges for railroad companies. * * * Assuming that the state is not controlled by contract between itself and the railroad company, the question is how far the authority of the legislature extends in the case where it has the power of regulation? And also the right to amend, alter or repeal the charter af a company, together with a general power to legislate upon the subject of rates and charges of all carriers? It has no right, even under such circumstances, to take away or destroy the property or annul the contract of a railroad company with third persons."

In *Citizens' Water Company* v. *Bridgeport*, 55 Conn., 1, it was provided in the 16th section of the charter of the Bridgeport Water Company that this act shall be subject to be altered, amended and repealed at the pleasure of the General Assembly. The 17th section is as follows:

"If said company shall fail to comply with and in all respects to perform the terms and conditions, provisions and stipulations contained in the proposition * * * relative to providing said city with water * * * then all the rights, powers and privileges conferred by this act shall cease and determine. * * *"

The court say:

"The legislature having in effect authorized the city to make a contract which it desired to make cannot now relieve it, al-

though the state is no party to and has no interest in the subject-matter of the contract. If it volunteers to invest a creature of its own, otherwise powerless, with power to make it, the legislature is therefore afterwards concluded with reference to it, and it is as lawful a contract as between two natural persons of full legal capacity and secure from interference other than judicial construction."

The right to repeal will not defeat any rights acquired by contract under a statute valid at the time the contract is made.

*Commonwealth* v. *Holyoke Water Power Co.*, 104 Mass., 446.

*Sage* v. *Dillard*, 15 B. Monroe, 341.

*The Sinking Fund Cases*, 99 U. S., 700.

(4) It is a significant fact' that in all the states of the Union excepting Florida, Indiana and Louisana, we now find some provisions relative to the repeal, alter or revision, reserved either in the constitution (1) or in the general statutes (2) relating to corporations. * In Illinois, Colorado, Iowa, Mary-

*We find the following words are incorporated in or used in the constitutions (1) or statutes (2) of the various states:

"Alter, Amend, or Repeal": (1) Alabama, Arkansas, California, Colorado; (2) Maine, Missouri. "Amended, Reviewed or Revive": (1) Delaware. "Amended, Altered or Repealed": (1) Michigan, Oregon, Utah, Washington, Wyoming; (2) Vermont, Virginia. "Alter, Reform or Amend": 2) Texas. "Alteration, Amendment, and (or) Repeal": (2) Connecticut, Massachusetts, Michigan, South Carolina. "Alter, Revise or Amend": (1) South Dakota. "Alter, Revoke or Annul": (1) Pennsylvania. "Limit, Restrict or Annul": (2) Wisconsin. "Alteration, Suspension or (and) Repeal": (2) Montana, New Jersey, New York, North Dakota, South Dakota. "Alter, Amend, Repeal, Modify or Annul": (2) New Hampshire. "Revoke or Annul": (2) Pennsylvania. "Repeal or Amend": (2) Tennessee. "Repeal or Amendment": (1) Mississippi. "Altered or Amended": (2) Minnesota. "Amended or Repealed": (1) Kansas; (2) Delaware, Rhode Island. "Altered or Repealed": (1) Maryland, Nebraska, Nevada, New York, North Carolina, Ohio, Tennessee, Wisconsin. "Repeal or Alteration": (1) Idaho, Montana, New Jersey, North Dakota, South Carolina. "Amend or Repeal": (1) Iowa; (2) California, Idaho. "Repeal": (2) Kentucky. "Rescind": (2) Arkansas. "Withdraw": (2) Georgia. "Revocable": (1) Georgia. "Alter, Charter or Alter or Repeal Any Laws": (2) West Virginia. "Subject to General Laws of the State": (1) Maine. "Alter, Amend or Repeal and Prescribe Regulations and Provisions": (2) Colorado. "Legislative Control, Altered, Abridged or Set Aside, Regulated, Withheld, or Subject to Conditions": (2) Iowa. "Shall Be Subject to All Provisions and Regulations by reason of Any Amendments of the Laws of the State": (2) Maryland.

land only do we find the words "regulations and provisions" or either of them, used.

In section 1, article 11 of the constitution of 1870, of Illinois, it is provided.

"No corporation shall be created by special laws, or its charter extended, changed or amended, * * * but the General Assembly shall provide by general laws for the organization of all corporations hereafter to be created."

Starr & Curtis' Stat., p. 193.

The authority to change or amend the statutes of Illinois relating to corporations must then be found in the general law relating to corporations. No provision is contained for changing or amending the statute is found. The only provision in the statute is said section 9. Having in view the object for which such provisions are inserted in the constitutions or statutes of various states relating to corporations, we find used the following words:

Alter, alteration, altering, amend, amendment, amended, abridge, annul, control, subject to conditions, limit, modify rescind; reform, repeal, repealed, restrict, review, revoke, revocable, revoked, suspended, suspension, withdraw.

The maxim of *expressio unius exclusio alterius* applies to construction of the statutes and constitutions the same as contracts.

In using the words "regulations and provisions" in section 9 of the incorporation act instead of the words used in the constitution must have intended to limit the powers simply to such acts as we have indicated. (*Supra*, p. 94.)

(5) Wherever this question has come before this court, the intention to modify the charter has been clearly expressed.

A few cases will suffice to illustrate our point.

In the Pennsylvania College case, 13 Wall., 90, we find the words, "alter or modify," used in the statute.

In the case of *Miller* v. *New York*, 15 Wall., 478, we find the words, "alteration, suspension or repeal."

In *Holyoke Water Power* v. *Lyman*, 15 Wall., 500, "amended, altered or repealed."

In *Shields* v. *Ohio*, 95 U. S., 319, the words "altered, revoked or repealed."

In *Greenwood* v. *Freight Co.*, 105 U. S., 13, the statute provided that every act relating to organization of a corporation "should be subject to amendment, alteration or repeal."

In another case, however, that of *Beer Co.* v. *Massachusetts*, 97 U. S., 25, the statute contained a provision that the legislature might "from time to time make further *provisions* and *regulations* for the management of corporations * * * or wholly to repeal any act or part" thereof establishing any corporation.

The use of the words "provisions and regulations" in section 9 could not have the effect of an amendment or alteration, substitution, revoking or repealing the statute relating to corporations. Had such been the intention, it would have been made plain. That our contention is correct is shown in *Beer Co.* v. *Massachusetts*, where this court recognized the fact that providing for "regulations and provisions" was for the management of the corporation, and that it was not the intention of the legislature when passing the act of 1891 even to regulate the manner or character of carrying on the business of the corporation so as to interfere with its internal operation.

The right to make regulations and provisions does not give the power to repeal. If it was the intention of the legislature by the Act of 1891 to alter or amend the charter of the corporation, it would have expressed such intent in explicit terms.

(6) There is nothing, in either the *Spring Valley Water Works* v. *Schlotter*, 110 U. S., 347, or *San Diego Light Co.* v.

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*National City*, 174 U. S., 739, cases, which conflicts with the doctrine contended for by us. They are not parrallel cases.

The constitution of California expressly provides that:

"The use of all water is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law."

That the rates should be established annually by ordinance on or before February 10th in each year, such ordinance to take effect on July 1st thereafter, "and shall continue in force for one year, and no longer."

In these cases, the company was organized after the constitution went into effect. The company had full notice of the provisions of the constitution, and, as the court say:

"Took its rights subject to this provision."

In the case at bar, the plaintiff in error did not take the contract with a limitation on the part of any person as to the extent of the price, but Shelton took the contract upon the authority of the legislature, that the water rates should be fixed.

C.

*The ordinance of February 10, 1896 was not passed under what is called the reserved police power.*

The term "police power" has never been specifically defined.

Its application depends upon the circumstances of each case as it arises.

Be this power what it may, it cannot be used toward the impairment of a contract valid at the time of its execution.

"All-embracing and penetrating as the police power of the state is, and of necessity must be, it is, nevertheless, subject, like all other legislative powers, to the paramount authority of the state and Federal constitutions. A right conferred or pro-

tected by the constitution cannot be overthrown or impaired by any authority derived from the police power."

1 Dillon on Mun. Corp., § 142.

In speaking of the exercise of police power, COOLEY, in his work on Con. Lim., *p. 577, says:

"They (the legislature) must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact and not amendments of the charter in curtailment of the corporate franchise."

See also Morowitz on Corporations, §§ 1101-2, 1112.

It is true this court (Mr. Chief Justice FULLER) said in *N. Y. & N. E. R. R.* v. *Bristol*, 151 U. S., 567; that it is

"Established in this court that the inhibitions of the Constitution of the United States upon the impairment of contracts or the deprivation of property without due process of law or of the equal protection of the laws by the states are not violated by the legislative exercise of legitimate power in securing the public safety, health and morals."

Yet in the same case, the court say it is equally well established (quoting from *Close* v. *Glenwood Cemetary Co.*, 107 U. S., 466), that:

"A power reserved to the legislature to alter, amend or repeal a charter authorizies it to make any alteration or amendment of a charter granted, subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

Speaking of this (police) power, Mr. Justice PECHHAM, in *L. S. & M. S. Ry. Co.* v. *Smith*, 173 U. S., 689, says:

"This power must, however, be exercised in subordination to the powers of the Federal constitution. If in the assumed exercise of its police power, the legislature of a state directly and plainly violate a provision of the Constitution of the United States, such legislation would be void."

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Undoubtedly the case of *Munn* v. *People*, 94 U. S., 113, and kindred cases, will be cited and quoted from as sustaining the authority of the legislature to pass the act of 1891. We shall not now here attempt to criticise that case. We shall not here attempt to discuss the extent to which the doctrine announced in that case applies. We contend that that case is not in point.

In the case at bar, a right was granted to Shelton and his assigns under a power expressly given by the legislature to furnish water for defendant in error for the time limited by the statute, and by ordinance as therein provided.

Commencing with the case of *New Orleans Gas Light Co.* and *Louisiana Light, Etc. Co.*, 115 U. S., 650, this court has frequently held that contracts relating to gas or water similar to the one in question, and for a limited period were valid contracts.

In *New Orleans Gas Light Co.* v. *Louisiana Light, etc. Co.*, 115 U. S., 650, where the city grant an exclusive license to sell gas for fifty years, after reviewing many of the cases in this court which held that "one legislature cannot so limit the discretion of its successors that they may not exact such laws as are necessary to protect public health or public morals." Still, such doctrine was not applicable to such a license, and says:

"The present case involves no such considerations. We have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has

become one of the most important agencies of civilization for the promotion of the public convenience and the public safety.

It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, that work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable, either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or that the public would have been deprived of the security in person, property and business which comes from well-lighted streets."

In *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S., p. 675, Mr. Justice BROWN says:

"Nor do we undertake to say that the legislature may not, in the exercise of a wise foresight and, for the purpose of directing capital to enterprises of doubtful profit, authorize the granting of monopolies for a limited time, irrevocable by subsequent legislation. To do so would practically ignore or overrule a series of cases to which we have already adverted, wherein corporations have been induced to furnish municipalities with bridges, gas, water and other requirements of modern civilization, by the promise of exclusive privileges for a term of years."

See, also,

*Railroad* v. *Maine*, 96 U. S., 511.

*The Sinking Fund Cases*, 99 U. S., 700.

*New Orleans Water Works* v. *Rivers*, 115 U. S., 674.

But this question is no longer an open one in this court.

In *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9, Mr. Justice BROWN, rendering the opinion, said:

"The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health or morals of its inhabitants, but it is to cases of this class that these rulings have been confined.

If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the constitution is ineffectual." * * *

And after referring to prior decisions of this court, says:

"*But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.*"

Says Mr. Chief Justice WAITE in the Railroad Commission cases, 116 U. S., 347, when speaking of the object of the Railroad Commission act:

"The great purpose of the statute now under consideration is to fix a maximum of charges and to regulate in some manner of a *police nature* the use of railroads in the state."

This court having settled in the Walla Walla case that the right to regulate the price of water is not within the purview of the police power as laid down in *Munn* v. *People* and kindred cases. The doctrine of police power is not applicable as against the rights of plaintiff in error in this case.

## III.

*The effect of the Ordinance of February 10, 1896, is to take the property of plaintiff in error without due process of law, in violation of Section 10, Article XIV, of the amendments to the Constitution of the United States.*

### A.

The act of June 6, 1891, prescribes that in all cases the municipal authorities are

"Impowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation, to such city, town or village, and the inhabitants thereof, such rates and charges to be just and reasonable, and in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and *determined* by the Circuit Court in the county in which said city, town or village may be."

(1) We have not only shown that the ordinance of February 10, 1896, did impair the obligation of the contract entered into between Shelton and defendant in error, but such ordinance also took the property of plaintiff in error without just compensation and without due process of law.

In considering this question, we must not lose sight of the fact that in making this contract the municipality was not acting in its capacity of a sovereign, but in the capacity of a private (not public) corporation, the same as a private person.

Many circumstances and conditions enter into and should be considered in determining what are reasonable rates; such as the amount of money invested in the plant; the cost of operating the same and the net income to be derived therefrom; the character and the nature of the improvement; the probability of increased or decreased compensation; the facilities

or difficulties in obtaining a supply of pure and wholesome water, the length and character of water mains required to be supplied; the distance to which the outlaying mains have to be extended and carried; the distance from which such water supply must be brought and pumped; the supply to be maintained; the extent of the probable call to be made by the city for free water; the character and extent of the improvements of the city itself; their liability to exposure from fire from factory and other causes; the density of the population; these and innumerable other causes which naturally arise and suggest themselves should and must be taken into consideration in determining whether or not the rates established under the ordidinance of February 10, 1896, were reasonable.* None of these or any other circumstances are required by the statute to be considered by the city in establishing rates. No previous notice to the party furnishing water is required to be given under the statute. It is wholly an *ex parte* proceeding.

The legislature however (in acting by itself or commissioners) is an unbiased party, without any interest in the matter, and always affording an opportunity of the party whose property is to be affected to be and appear and be heard; in other words, an independent "body of men." Not so here, the establishment of water rates, in the first instance, is solely at the whim of the municipality.

In all cases it is the duty of the persons on whom is imposed the duty of determining rates to make so full and sufficient examination to pass upon the matter intelligently.

In *San Diego Light Co.* v. *National City*, 174 U. S., 751, in commenting upon a statute under which no notice was re-

*As illustrative; see the opinions of Mr. Justice Brewer in *Reagan* v. *Farmers L. & T. Co.*, 154 U. S., pp. 399 to 412, as to what circumstances should be considered in establing reasonable rates for railroad companies, and Mr. Justice Harlan, in *Smyth* v. *Ames*, 169 U. S., 492 to 550.

quired to be given to the party who was to be affected, Mr. Justice HARLAN says:

"It does not follow, however, that because no notice is necessary, the board are for that reason excused from applying to corporations or individuals interested to obtain all information necessary to enable it to act intelligently and fairly in fixing rates. This is its plain duty, and the failure to make proper effort to procure all necessary information, from whatever source, may defeat its action."

(2) Counsel will contend that under such act, even if the rates as established by ordinance of February 10, 1896, are unreasonable, plaintiff in error has his remedy in the Circuit Court.

Establishing rates is a *legislative*, and not a *judicial*, act.

The principle applicable to this case is the same as that in the establishment of railroad rates, which have so often come before the courts. In those cases, the rates are first established either by the legislature itself or by a commission—an independent tribunal *pro hac vice*, the state, in its legislative capacity, determining what are reasonable rates.

It has been found to be impracticable to regulate by an elaborate system of legislation the duties of railroad companies to the state or nation. All the minor matters to which the powers of the government could be properly extended, hence there have been created in most of the states railroad commissioners. These acts have been sustained as constitutional, but in each such case the commissioners are disinterested parties, and, as such, make an impartial and complete investigation before establishing rates. They are an impartial tribunal, who are either appointed by the Executive or elected under provisions adopted by the legislature to hear evidence and determine as a branch of the legislature what are reasonable rates.

In speaking of such commissions, in 2 Redfield on Railways, § 246, the author says:

"Such a board, if properly constituted, can scarcely fail to be of very essential service to the legislature of the several states whose sessions are short, and whose members are often inexperienced, both in the detail of general legislation requisite for the proper management of railroads, and especially with the devices sometimes resorted to for the purpose of gaining unequal and unjust special legislation on behalf of interested individuals or corporations, but the benefit of a board must depend chiefly upon its intelligence and *independence*. Without these, it might become an instrument of wrong and injustice, more effective perhaps than an ordinary legislative committee."

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 394, Mr. Justice BREWER says:

"Such a commission is merely an administrative board, created by the state, for carrying into effect the will of the state as expressed by its legislature. R. R. Commission Cases, 116 U. S., 307."

In the various cases which have come before the courts involving this question, more numerously in railroad than in other cases, the legislature and courts recognize the fact that such commissions were acting as the representatives of the legislative department of the state, before whom railroads were authorized to appear, present data, and an opportunity afforded them to be heard, as to establishing or changing rates, and thus at the least an opportunity afforded them at law before their property rights were effected or destroyed.

The courts have uniformly held that the act of *establishing* and *determining* rates was a legislative act, and not a judicial act, and that, while they will grant relief against unjust and unreasonable rates, they will not *establish* or *determine* rates.

"It is insisted that the owner of property is entitled to a reasonable compensation for its use, even if it be clothed with a public interest, and what is reasonable is a judicial and not a legislative question. As has already been shown, *the practice has been otherwise.*"

*Munn* v. *People*, 94 U. S., 113.

"The legislature must decide rates. The court can only control."

*Dow* v. *Beidelman*, 125 U. S., 680.

Says Mr. Justice BREWER in *Chicago, etc., R. R. Co.* v. *Wellman*, 143 U. S., at page 344:

"The legislature has power to fix rates, and *the extent of judicial interference is protection against unreasonable rates. Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S., 307; *Chicago, Milwaukee, etc., R. R.* v. *Minnesota*, 134 U. S., 418."

This language was quoted and approved in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 398.

As was said by Mr. Justice BREWER in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U S. (at p. 397):

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet, it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, *nor the limits of judicial inquiry altered*, because the legislature, instead of the carrier, prescribes the rates. *The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission;* they do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers; *they do not engage in any mere administrative work*; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

Says Mr. Justice BREWER, in *Inter State Commerce Commission* v. *R. R. Co.*, 167 U. S., p. 499 :

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act, but it is entirely different thing to prescribe rates which shall be charged in the future—*that is a legislative act.* *Chicago, Milwaukee, &c., Railway* v. *Minnesota*, 134 U. S., 418, 458; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 362, 397; *St Louis & San Francisco Railway Co.* v. *Gill*, 156 U. S., 649, 663; *Cincinnati, New Orleans &c. Railway* v. *Interstate Commerce Commission*, 162 U. S., 184, 196; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S., 197, 216; *Munn* v. *Illinois*, 94 U. S., 113, 144; *Peik* v. *Chicago & North-Western Railway*, 94 U. S., 164, 178; Express cases, 117 U. S., 1, 29."

See, also,

*San Diego Land Co.* v. *National City*, 174 U. S., 750.

These cases show that the power to *determine* rates conferred upon Circuit Courts in the act of 1891, is a *legislative* act and one which the court has no power enforce.

(2) Article 3 of the constitution of 1870 of Illinois provides:

"The powers of the government of this state are divided into three distinct departments: the legislative, executive and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Starr & Curtis' Stat., p. 117.

This provision of the constitution has frequently come under the consideration of the courts, and it has been held that the judiciary has no power to infringe upon what are legislative acts.

*Field* v. *People*, 2 Scammon, 79.
*City of Galesburg* v. *Hawkinson*, 75 Ill., 152.
*Dodge* v. *Cole*, 97 Ill., 338.

As illustrative of this is the case of *City of Galesburg* v. *Hawkinson*, *supra*, where the legislature passed an act authorizing the voters of any territory to file a petition in the Circuit Court in certain cases, and authorizing the court either to exclude such territory from, or annex such territory to, villages and towns. The matter is so clearly stated in the opinion that we may be pardoned in quoting therefrom.

Mr. Justice SCHOLFIELD says:

"The boundaries of the city of Galesburg are defined by its charter and amendments thereto, and any change in those boundaries must necessarily contract or enlarge the sphere of its municipal jurisdiction, and, therefore, constitute, so far, an amendment of its charter. That the legislature may delegate authority to a municipal corporation to make changes in its boundaries does not affect the principle we claim to be applicable here, for in such cases the municipality acts through its legislative authority; nor is it necessary to inquire how far a law may, in its application to persons, or things, be made to depend on prescribed conditions. The attempt here is to invest the judiciary with power, not merely to determine whether certain prescribed conditions upon which the law is to take effect exist, but whether as to a certain locality there ought to be a change in the existing law on a particular subject, and if, in the opinion of the court, the change ought to be made and injustice will not be done thereby, it is empowered to make it. Wherein would the principle be different if the legislature had authorized the Circuit Court to receive the petition of a certain number of citizens of any incorporated city, town or village, to pay out and improve certain streets, or to prohibit domestic animals from running at large within the corporate limits, and hear evidence on the subject, and if it should find that the streets ought to be laid out and improved or domestic animals should be prohibited from running at large, and no injustice would be done thereby, to render a decree to that effect? We see none; and yet it is too patent to admit of illustration that this would be legislative and not a judicial determination. Whether cities, towns or villages should be incorporated, and, if incorporated, whether enlarged or contracted in their boundaries, presents no question of law or fact for judicial determination. It is purely a queston of

policy, to be detrmined by the legislative department. In the language of WOODBURY, J., in *Merrill* v. *Sherburne*, 1 N. H., 204, 'a marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is applied by the one, *and made by the other.* To do the first, therefore, to compare the claims of parties with the law of the land before established, is in its nature a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is, in its nature, a legislative act.'

It is of the essence of a judicial determination that it shall, so long as unreversed, and not vacated, be conclusive as to the matters involved in the controversy; but it must be admitted that the legislature might, after this decree was rendered, have revered the decision of the court by fixing, by statute, the boundaries of the city differently from those declared by the decree.

The proposition, to our minds, may be reduced within a very small compass. *The same power cannot be either legislative or judicial, as the legislature may incline to retain it, or surrender it to the judiciary.*"

The power given Circuit Courts is to "review *and* determine" what are reasonable rates.

Webster defines "determine" to mean "to regulate; to resolve; to settle; to *decide;* to ascertain definitely," etc. The Century Dictionary defines "determine" "to find out; to make out; to ascertain or state definitely; to *fix* or ascertain definitely," etc.

Thus was given to the Circuit Courts the power to *decide, regulate* and *fix* what are reasonable rates. That is a *legislative* act—not a *judicial* act.

"*The extent of judicial interference is protection against unreasonable rates.*"

*Chicago, etc., R. R.* v. *Wellman, supra.*

"*Courts* * * * *do not* DETERMINE * * * *what under all circumstances would be fair and reasonable.*"

They "are not authorized to revise or change the body of rates imposed by a legislature" (municipality *pro hac vice* the legislature).

*Reagan* v. *Farmers Loan & T. Co., supra.*

That is mere administrative work.

The power to determine whether one rate would be "fair and reasonable" must *ex necessitate* be *determined* by the legislature. It cannot be both a *legislative* and a *judicial* act. The legislature, as stated in *Galesburg* v. *Hawkinson*, cannot *surrender* such power to the judiciary. Under the provisions of the constitution these powers must be kept distinct.

The judiciary are not here given power to protect *against* an unjust or unreasonable abuse of the power of a municipality to establish rates which is the limit of the power of courts; but they are given full power to determine, *i. e.*, to resolve; to decide; to regulate and to fix definitely such rates. This duty the legislature have no authority to empower the judiciary to perform. The power given in the statute is to review *and* determine. not restrain an abuse; but the court as a *branch* of the legislature is to establish anew what it deems reasonable rates.

A court cannot, therefore, *determine* what are just or reasonable rates to be charged. If the court should attempt to establish, *i. e.* determine rates, it would be a usurpation of the legislative prerogative. It is not the duty of the court to establish rates, but to check legislative authority in the unjust use or abuse of that power.

(3) If defendant in error, in its private capacity, being a party to a civil contract, is given by the legislature the power to fix, pass upon what it should deem to be just or reasonable charges, *it is made to be a judge in its own case.*

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This the legislature cannot do, and has no power to authorize to be done.

In the case at bar, the spectacle presents itself of an obligee under a contract sitting in judgment in its own case—passing upon the question of what the obligee, in its own absolute discretion, deems to be a reasonable price to be paid on such contract, nor what should be determined as a reasonable sum by the legislature or by an impartial body of persons acting as commissioners, sitting in their stead, before whom plaintiff in error could appear, and to whom an opportunity of being heard in his own behalf would be afforded, if the rates established by the solemn contract of the parties were not reasonable. And if reasonable rates were to be established that should only be done upon full information and due examination and consideration of the numerous circumstances which enter into and form a basis upon which such body should act.

*Nemo debit esse judex in propria sua causa*, is a maxim of the common law.

Broom's Legal Maxims, 118.

Even the English Parliament, whose power and jurisdiction "is absolute and without control" (1 Black. Com., p. 161), and which Lord Coke says "Cannot be confined, either for cases or persons, within any bounds" (4 Inst., 36), is bound by this natural law.

"And, therefore, it is laid down that even an act of Parliament, made against natural equity as to make a person judge in his own case, is void in itself. For *jura naturæ sunt immutabilia*, and they are *leges legum*." Broom's Legal Maxims, *119

(Quoting from the opinion in *Day* v. *Savage*, Hob., 856).

This principle of law has come down to us from our British ancestors with the *Magna Charta* as part of the common law.

The common law of England prior to the fourth year of James the First has been adopted as the law of the State of Illinois.

(Starr & Curtis Stat., p. 901.)

This rule is not a local rule. It is of a general nature, and is as applicable to the affairs of to-day as when it was first recognized.

Speaking of natural law, Blackstone (1 Com., 41) says:

"This law of nature being co-evil with mankind, and declared by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries and at all times. *No human laws are of any validity if contrary to this.*"

This law of nature is part of the common law of Illinois. The constitution of the State of Illinois is subject to this natural law. It is not within the province of the legislature of the State of Illinois to abolish it.

In *Washington Ins. Co.* v. *Price*, Hopkins Ch., 1, it is said:

"It is a maxim of every code in every country, that no man should be judge of his own cause. The learned wisdom of united nations and the unlettered ideas of ruder societies are in full accordance upon this point. * * * Though the principle that a party can never act as judge is not declared by our constitution or statutes, yet it is a maxim of universal justice, and is undoubted law in England. It exists here, and it exists there—a rule of the common law. It is not left to the discretion of a judge or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation."

"No one ought to be a judge in his own cause, and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that even an act of parliament made against natural equity as to make a man a judge in his own case is void in itself for *jura naturæ sunt immutabilia* and they are *leges legum.*"

Cooley Con. Lim (2nd Ed.), 412.

"To empower one party to a controversy to decide it for himself *is not within the legislative authority*, because it is not the establishment of any rule of action or decision."

Cooley on Con. Lim. (4th Ed.), 412.

Says the court in *Sanborn* v. *Fellows*, 22 N. H., 473, where one of the fence viewers was an uncle of one of the parties:

"We should not expect to find many cases where the question has arisen in relation to that class of officers usually called judges, because any attempt by such a person to act as a judge in a case in which he was personally interested, or in which any of his near relatives are interested would be so grossly indecent and improper that it would be at once condemned by public opinion."

The court held the entire proceedings *coram non judice*.

In *Dimes* v. *Grand Junction Canal*, 3 House of Lords Cases, 759, where the vice-chancellor who heard the case was a stockholder in a corporation party complainant to a suit, the decree was reversed.

Lord CAMPBELL said:

"No one can suppose that Lord Cottonham could be in the remotest degree influenced by the interest he had in the concern. But, My Lords, it is of the least importance that maxim that no man is to be a judge in his own case should be held sacred, and that is not confined to a case in which he is a party, but applies to a case in which he has an interest."

Although there are but few cases found in the books, be it said to their credit, where judges themselves were interested, still the principle has been extended and applied to all those cases where a party acting in a capacity which is liable to affect his own interest. The rule has been applied more extensively to parties in interest sitting as jurors.

But a case in which the principle contended for by us is clearly announced is the case of *State* v. *Crane*, 36 N. J. Law (7 Vroom), p. 394. Commissioners were appointed to authorize highways and assess damages. The land of one of

the commissioners was taken and for which he was allowed damages. The court held that although there was a majority of commissioners without the one interested, still "it was the duty of the court to set aside the whole proceedings," and this in spite of a statute which provided that whenever a majority of the commissioners of highways signing a report who were competent and disinterested, such report should not be considered illegal, and the court, after discussing and admitting that the interest as a taxpayer would not be sufficient to operate against the rule, the legislature having subsequently sought to legalize such action, say:

"But the interest of this commissioner was of a different character. It was peculiar and direct. In *Schroeder* v. *Ehlers*, 2 Vroom, 44, the present chief justice inclined to the opinion that the rule that a man cannot be a judge in his own case is so fundamental that the legislature cannot destroy it, and his references show the strong tendency of the English courts in the same direction, as respects an act of Parliament. Lord Coke declared, while sitting judicially, that 'even an act of Parliament, made against a natural equity, as to make a man a judge in his own case, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*.' Hobart, 87a. In England the courts would naturally avoid any decision affecting the omnipotence of Parliament, and seek by possible construction to show an intent in every statute consistent with common right and natural justice. That latter would also be the duty of the courts here if it could be done as it was done in *Schroeder* v. *Ehlers*. But the question cannot now be disposed of in that way. It must be distinctly met. Judge Cooley, in his valuable book, says, that he does not see, apart from the exceptions given, 'how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people indeed, when framing their constitution may establish so great an anomaly, but if the legislature is entrusted with apportioning and providing for the exercise of the judicial power, we cannot understand them to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower

one party to a controversy to decide it for himself, is not within the legislative authority; because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.' Const. Lim., 412; see, also, in the same subject, *Ames* v. *Port Huron Co.*, 11 Mich., 139.

It seems to me that it cannot rationally be disputed that there exist certain legislative powers outside of written constitutions and fundamental to the due exercise of sovereignty, and also certain legislative restrictions for the protection of the property of the people, alike fundamental. An instance of power is that of the taking of private property for public use upon compensation, and it does not depend upon any constitution. It is an attribute of sovereignty. *Sinnickson* v. *Johnson*, 2 Harr., 145. An instance of restriction is, that private property cannot be taken for private use. The legislature cannot pass an act to take the land of one man and give it to another. That prohibition is not in the constitution, yet it lies deep in the fundamental nature of our government, which is intended, among other things, to secure the natural and inalienable rights of property. There are certain great principles of justice that the people have not parted with to their legislatures, and which cannot be violated without disregarding and defying the essential nature of our government and system of laws.

The maxim under consideration has always been regarded in English jurisprudence as elementary and fundamental in judicial action (Coke. Lyt., § 212, Broom 109), and, I think, can no more be materially invaded by the legislature than it could pass an act that a judge might decide according to lot, or for a party who should give him the most money. The Chief Justice, in *Schroeder* v. *Ehlers*, says, 'that a person cannot be a judge in his own case has ever been regarded as one of the fundamental maxims of the law of nature'; also, that the injustice of allowing it is intuitive in the human mind. In my judgment, the legislature is impotent to break down this great barrier to tyranny and fraud. The power of the legislature has been seriously questioned even in removing disabilities for a common interest, and the fair implication of the case is, considering the ground upon which it is sustained, the remoteness and smallness of the interest, that it does not reach beyond

interests of a general nature. (See cases referred to.) The maxim is inherent in and a part of the nature of judicial action, and although in many matters the legislature may provide for the exercise of judicial functions, and designate the persons who shall exercise them, yet it cannot, in so doing, lose sight of the essential character of judicial action, and authorize or sanction a judgment through instrumentalities contrary to the innate and universally recognized sense of natural justice. In such a case, the power conferred would not be judicial, it would be tyrannical.

The legislature could not have directly authorized these commissioners, if interested, to decide their own cases, and certainly a retrospective act of the same character ought not to be sustained. But the act in question seeks to cure the taint by expunging the objectionable commissioners from the board, and giving effect thereby to the action of the remaining three. In other words, the object is to separate the action of one commissioner from the others after the mischief, and to abridge the influence that his interest would otherwise have. That will not help it, for the law does not sever the action that is tainted. The whole is affected. It is an entirety. A majority of the board could have legally acted without Hammer, but he having taken part in the proceedings, the whole was voidable on proper application. *To sanction an act of the legislature, ratifying it in such a mode, would be indirectly crippling the natural force and effect of the maxim, and depriving the prosecutors of its reasonable protection.*"

In *Ames* v. *Port Huron Log Driving & Booming Co.*, 11 Mich., 139, the corporation was organized under the general law relating to management and control of logs floating in rivers. Under the statute, the defendants were authorized to remove all obstructions in the stream, caused by accumulation of logs, assume control of the logs, run them down, and deliver them to the respective booms where they belonged, at the expense of the owners of the logs, and were given lien on such logs for such amount as should be sufficient to satisfy all just and reasonable charges, proportionate to the amount of the expense attending such matter, with power to sell such logs

for such charges and expenses, upon statutory notice being given by advertisement, and to bid in such amount if the amount of such expenses were not paid for the amount thereof.

The court held that these proceedings were *ex parte*, and *in invitim*, and say:

"It is an inflexible principle of constitutional right that no person can be legally divested of his property without remuneration or against his will, unless he is allowed a hearing before an impartial tribunal, or he may contest the claim set up against him, and be allowed to meet it on the law and the facts."

And that such proceeding "makes the company judge in its own case, and impowers it to execute its own judgments. Such a proceeding is too plainly illegal to admit of extended argument."

In *Stoddard* v. *Moulthrop*, 9 Conn., 502, the statute directing the appointment of commissioners upon insolvent estates, and providing for their qualifications, is conversant with judicial offices only, and the disinterestedness, therefore, required of them must be the disinterestedness of a judge, and not that of a witness, and we have seen that, by the law of the state, a judge cannot be disinterested who stands in so near a relationship to the parties interested, as that of brother and brother, by nature or marriage.

In *Earl* v. *Stocker*, 2 Vernon, 251, an award was set aside, one of the arbitrators appearing to have an interest in the cargo touching which the award was made.

In *Regina* v. *Aberdare Canal Co.*, 14 A. & E. (N. S.), 854, where, under a statute, commissioners were appointed for settling all questions and differences between the company and the land owners whose land was affected, and, although the statute provides that all persons having certain property interests were appointed commissioners for settling all questions and differences between the canal company and the land

owners, still, where the chairman, directors and shareholders of the railway company whose lands were therein affected, acted in such commission, the court held that the action of such commissioners was illegal.

In *Regina* v. *Recorder of Cambridge*, 8 E. & B., 637, upon an appeal to the quarter sessions of the borough of Cambridge, by a water company against an assessment to the poor rate, the deputy recorder of the borough presiding, the rate was reduced and costs given to the appellants. At the time of hearing the appeal, the deputy recorder was a shareholder in the company, and although he had in fact sold his shares, he had not completed the transfer of them. He was held incompetent to try the appeal.

In *Walcott* v. *Ely*, 2 Allen (Mass.), 338, it was held that the appointment by an officer of a son-in law of a judgment creditor as an appraiser of land seized on execution rendered void a levy based on an appraisement by him.

In *McGough* v. *Wellington*, 6 Allen (Mass.), 505, it was held that a sale of attached property, upon an appraisement in which a brother of the attaching creditor was appointed an appraiser by the officer, was void.

It is not our intention to cite or quote other cases. Numerous references are made to such cases in Notes to Broom's Legal Maxims, 118, and Volume 12 Amer. & Eng. Ency. Law, 44.

In the latter it is said:

"The rule of disqualification for the causes indicated is broad, and is applied to all classes of cases where *one* is appointed to decide between conflicting rights."

These cases cited fully support the text.

In *Ry. Co.* v. *Minnesota*, 134 U. S., 418, this court held that where, under a statute, commissioners were appointed,

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whose rates, when established, were final, and from whose decision no resort could be had to a court of law or equity, and although such parties could appear before the commissioner and be heard, such act was unconstitutional and void.

Is the act of 1891, which, in reality, depriving plaintiff in error from the right to resort to a court of equity to prevent abuse of unjust rates and which authorizes a party to a contract in violation of and in abrogation of this settled principle of the common law, any the less void? The defendant in error, standing in the capacity of a private corporation, cannot, in violation of that rule, establish rates which it shall pay.

Suppose the positions of the parties were reversed, and the statute authorized plaintiff in error to establish what it thought was reasonable rates, notwithstanding the terms of his contract? Would not such a position strike one as abhorrent to the law, and clearly against the doctrine that no person should be judge of his own case? The same principle is applicable to either party to a contract alike.

Under the authorities, therefore, the fact that a municipality, as a private individual (not acting in its sovereign capacity), is appointed to pass upon its own rights, renders the whole act of 1891 void.

Where there is no valid statute, however, as here, by reason of the interest of defendant in error making void the entire statute, there is nothing for the court to review.

A void law "is, in legal contemplation, as inoperative as if it had never been passed."

Virginia Coupon Cases, 114 U. S., 269.
*Norton* v. *Shelby County*, 118 U. S., 425.

The statute being void cannot be made valid from the fact that defendant in error requested plaintiff in error to appear

before it. Defendant in error was none the less judge in its own case, even if plaintiff in error had appeared before it, which it did not do.

We are not here asserting that the municipal authorities of the City of Freeport, in establishing such water rates, were guilty of any fraudulent action. But we do insist that under the law the parties establishing such rates should be above suspicion. They should not be placed in a position where they are subjected to any influence or are liable to lose their independence.

"And without intelligence and independence," says Mr. Justice Redfield (*supra*, 115 ), "such commissions might become an instrument of wrong and injustice, more effective, perhaps, than the ordinary legislative committee."

(4) It will be claimed that the doctrine contended for by us relates solely to and is applicable to judicial bodies only.

We contend that, independent of the 14th amendment to the constitution of the United States, it was not within the power of the legislature, as stated by Mr. Cooley, to do away with the rule of law that no one shall be judge in his own case.

It is certainly so established in this court as the law, since the passage of the 14th amendment to the constitution of the United States.

Says Mr. Justice STRONG, in delivering the opinion in *Ex parte Virginia*, 100 U. S., 339:

"Nor does it make any difference that such legislation is restrictive of what the state might have done before the constitutional amendment was adopted. The prohibitions of the 14th amendment are directed to the states, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, *whether that action be executive, legislative or judicial.*

* * * * *

We have said the prohibitions of the 14th amendment are addressed to the states. They are: 'No state shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' *They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way.* The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; *and as he acts in the name and for the state, and is clothed in the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it.*

But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a state, and upon the persons who are the agents of the state in the denial of the rights which were intended to be secured."

That these constitutional prohibitions extend to all acts of the state whatever their source, whether through its *legislative*, its executive or judicial authorities, as stated in *Ex Parte Virginia*, has been repeatedly held and recognized by this court.

*Virginia* v. *Reeves*, 100 U. S., 313.
*Neal* v. *Delaware*, 103 U. S., 370.
*Yick Wo* v. *Hopkins*, 118 U. S., 356.
*Gibson* v. *Mississippi*, 162 U. S., 565.
*Blake* v. *McClurg*, 172 U. S., 260.

Says Mr. Justice GRAY, in *Scott* v. *McNeal*, 154 U. S., 45, when speaking of the fourteenth article of the amendment to the constitution of the United States:

"These prohibitions extend to all acts of the state, whether through its *legislative*, its executive, or its judicial authorities. *Virginia* v. *Rives*, 100 U. S., 313, 318, 319; *Ex parte Virginia*, 100 U. S., 339, 346; *Neal* v. *Delaware*, 103 U. S., 370, 397. And the first one, as said by Chief Justice Waite in *United States* v. *Cruikshank*, 92 U. S., 542, 554, repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely*, 4 Wheat., 235, 244, was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Blackstone says laws of nature, *leges legum*, are superior in obligation to any other. No human laws are of any validity if contrary to them. (*Supra.*)

The rule is as applicable to the state itself as to the humblest citizen—it is universal. The constitution does not attempt to abolish the rule. The rule, though not written, was incorporated in the constitution, and the legislature, equally with the judiciary, are bound by it.

B.

(1) The contract between Shelton and defendant in error was for the entire period of thirty years. When Shelton made such contract, he assumed the risks incident to changes in circumstances during such period, be such change great or small. He did not contract with defendant in error that it should increase his risk except as stated in the contract. He did not contract that defendant in error should, of its own volition, diminish the rentals as here in the case at bar, reducing such rates, in many instances, to less than one-half of those contracted for.

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Shelton's rights under such contract were property rights.

2 Kent's Com., 251.

In *Rigney* v. *City of Chicago*, 102 Ill., 77, the court say:

"Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particuler things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution."

In *Chicago & Western Indiana R. R.* v. *Englewood, etc., R. R. Co.*, 115 Ill., 385, it is said:

"Property itself, in a legal sense, is nothing more than the exclusive right to possession, of enjoying and disposing of a thing which, of course, includes the use of the thing."

In the Sinking Fund Cases, 99 U. S., 700, Mr. Justice STRONG discusses due process of law, and what is property, and says:

"What is property? What is the common understanding of the term? It is, in reference to its subject, whatever a person can possess and enjoy by right, and the person who has that right has the property. The subject may be corporeal or incorporeal. A right in action is as completely property as is a title to land. A very large portion of the property of the country consists in rights attendant upon contract. * * * Indeed, it may be said that whatever rights are created by contract, or held under it, if they relate to property, are themselves, in a very just sense, property, and as such are protected by the fifth amendment to the constitution."

(2) Such property rights cannot be legislated away *in invitim*. That they cannot be taken for private use needs no authority to support the proposition. That they cannot be taken for public use without due compensation is equally well settled.

The defendant in error does not claim that the property rights of plaintiff in error were taken under the ordinance of February 10, 1896, for private use.

But plaintiff in error does insist that its property rights were taken for private use and that the property rights of plaintiff in error were taken *in invitim* by the state, and given to the municipality without any compensation whatever.

The only ground under which defendant in error justifies the taking at all is under what it claims as the reserved police power of the state. This police power could only be exercised because the public had the right to use and regulate the use of the property rights of plaintiff under the contract. We have already shown that the state it did not have such power.

Even if defendant in error had such power, the property rights of plaintiff in error could be taken only upon making plaintiff in error full compensation for the property so taken. No claim is made that any compensation was paid plaintiff in error for the property rights so taken. It is admitted by defendant in error that no compensation was paid therefor. Such property rights of plaintiff in error were taken without any compensation being paid therefor and it was deprived of its property without due process of law.

Says Mr. Justice SCOTT, in *Lake View* v. *Rosehill Cemetery Co.*, 70 Ill., 198:

"Under the power to regulate, the state cannot deprive the citizen of the lawful use of his property if it does not injuriously affect or endanger others. Among the beneficent provisions of Magna Charta is the protection guaranteed the subject in the free enjoyment of his life, liberty and property, except as the same might be declared forfeited by the judgment of his peers or the law of the land. This cardinal principle has been embodied in the constitutions of all the American states, and by a recent amendment it is now incorporated in the Federal constitution. In view of this constitutional guaranty it cannot be said that every legislative enactment that affects the interest of the citizen is necessarily the 'law of the land.' Such a construction would render nugatory every constitutional provision intended for the protection of private property.

If a person is to be deprived of his private property it must be by the exercise of the right of eminent domain, and in all such cases just compensation must be made."

In *Board of Education* v. *Blakewell*, 122 Ill., 348, the court, quoting from *Westervelt* v. *Gregg*, 2 Kern, 209, say:

"Due process of law undoubtedly means, in the due course of legal proceedings, *according to those rules and forms which have been established for the protection of private rights.* Such an act as the legislature may in the uncontrolled exercise of its power think fit to pass is in no sense the process of law designated by the constitution."

As was said by Mr. Chief Justice WAITE in the Railroad Commission Cases, 116 U. S., p. 331:

"It is not to be inferred that this power of limitation is without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to taking of private property for public use without just compensation or without due process of law."

These words have been quoted and this doctrine approved in numerous cases in this court.

In *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166, Mr. Justice MILLER says:

"It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not

taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

*Monongahela Navigation Co.* v. *United States*, 148 U. S., 324:

Says Mr. Justice BREWER:

"In the case of *Sinnickson* v. *Johnson*, 17 N. J. L. (2 Harr.), 129, 145, cited in the case of *Pumpelly* v. *Green Bay Company*, 13 Wall., 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and *it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.*'

And in *Gardner* v. *Newburgh*, 2 Johns. Ch., 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in nowise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

But we need not have recourse to this natural equity, nor is it necessary to look through the constitution to the affirmations lying behind it in the Declaration of Independence, for, in this fifth amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court, in *Boyd* v *The United States*, 116 U. S., 616, 635:

'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight

deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.* Their motto should be *obsta principiis.*' "

Mr. Justice BREWER says, in *Chicago, Milwaukee, etc., Ry. v. Tompkins*, 176 U. S., 172:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. *It has often been said that this is a government of laws and not of men;* and by this court, in *Yick Wo v. Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their developement, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' "

If, as has been repeatedly stated in this court, this government is "a government of laws" and not of men, or an unlawful body of men representing the legislature, then if the rights of plaintiff in error are to be taken or destroyed, it must be compensated therefor, and its damages ascertained by due process of law.

Mr. Webster, in his argument in the *Dartmouth College* case, has given that definition of "due process of law" which has received the approval of this court, and has been adopted by all the commentators upon constitutional law. He says:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds on inquiry, and enters judgment only after trial. The meaning

is, that every citizen shall hold his life, liberty and property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, the acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures of all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general, permanent law for courts to administer or men to live under." (8 Wheaton, pp. 581, 582.)

Lord Coke, in commenting on the 29th chapter of *Magna Charta*, says: 'No man shall be disseized, etc., unless it be by the lawful judgment, that is, verdict of equals; or by the law of the land, that is, to speak at once for all, *by the due course and process of law.*' 2 Coke, Inst. 46.

This court says in *Murray* v *Hoboken Land and Improvement Co.*, 18 How., 276: The words, 'due process of law,' were undoubtedly intended to convey the same meanings as the words 'by the law of the land,' in *Magna Charta.*"

This definition has been repeatedly approved by this court.

It is provided in section 13, article 2, of the constitution of Illinois, that

"Private property shall not be taken or damaged for public use without just compensation, which such compensation when not made by the state shall be ascertained by a jury as shall be prescribed by law."

Starr & Curtis Stat., p. 113.

When the legislature, through the instrumentality of its agent, *i. e.*, the municipality, passed the ordinance of February 10, 1896, reducing the water rates to be charged thereafter by plaintiff in error, it took from plaintiff in error its property rights lawfully acquired under its contract.

In some instances the reduction amounted to 60 per cent.

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and in none less than 10 per cent. from the stipulated and agreed price.

Suppose the municipality had, on the same day, passed an ordinance declaring that the water mains, pipes and hydrants in one of the three wards of the city were, and from thenceforth should be, the property of the municipality, would such act have been any less a taking of the property of plaintiff in error than depriving it of the rentals for which it had lawfully contracted?

(3) No compensation has been offered or attempted to be ascertained by legislative enactment or by judicial inquiry for the property rights so taken from plaintiff in error. No compensation has been paid or attempted to be paid plaintiff in error for such damages, or property so taken.

Without such compensation being made, plaintiff is deprived of his property without due process of law.

This question also came up before Judge JACKSON in *Scott* v. *City of Toledo*, 36 F. R., 395, who there says:

"The single question is therefore presented whether, in the taking of private property for public use, 'due process of law' requires that compensation shall be made to the owner for the property so appropriated. In other words, may a state, or any subordinate division thereof, since the adoption of the fourteenth amendment of the constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does 'due process of law,' without which the citizen cannot, under this fourteenth amendment, be deprived of his property by the state, involve as a necessary and essential ingredient the payment or the making of compensation for private property appriated to public use. * * *

Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution, it seems clear that since that amendment went into effect such limitations and restraints have been placed upon their power

in dealing with individual rights that the states cannot now lawfully appropriate private property without compensation to the owner; and that *any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment.* The conclusion of the court on this question is that since the adoption of the fourteenth amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, *no matter under what form of procedure it is taken*, would violate the provisions of the Federal constitution. There is no difference in principle between the case put by Mr. Justice Miller, as an illustration, in *Davidson* v. *New Orleans*, 96 U. S., 102, viz., *the taking property from A and vesting it in B, and the taking of property from an individual and vesting it in the public. 'Due process of law' is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery, or confiscation for the benefit of the public.*"

This matter was very fully gone over and discussed in *C. B. & Q. R. R.* v. *Chicago*, 166 U. S., 226. Mr. Justice HARLAN, delivering the opinion of the court, says:

"It is proper now to inquire whether the due process of law enjoined by the fourteenth amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.

In *Davidson* v. *New Orleans*, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the fourteenth amendment. See also *Missouri Pacific Railway* v. *Nebraska*, 164 U. S., 403,

417. *Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation.* Due protection of the rights of property has been regarded as a vital prineiple of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on constitutional law says, 'is that of enjoying private property without undue interference or molestation.' (p. 228.) *The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property.* It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' 2 Story Const., § 1790; 1 Bl. Com., 138, 139; Cooley's Const. Lim., *559; *People* v. *Platt*, 17 Johns., 195, 215; *Bradshaw* v. *Rodgers*, 20 Johns., 103, 106; Petition of Mt. Washington Road Co., 35 N. H., 134, 142; *Parham* v. *The Justices, etc.*, 9 Georgia, 341, 348; *Martin et al., Ex parte*, 13 Arkansas, 198, 206 *et. seq.*; *Johnston* v. *Rankin*, 70 N. C., 550, 555.

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, *but it is not due process of law if provision be not made for compensation.* Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. *Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right*

*of the owner to be compensated if his property be wrested from him and transferred to the public.* The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. * * *

The conclusion of the court on this question is, that since the adoption of the fourteenth amendment, *compensation for private property taken for public uses constitutes an essential element in 'due process of law,'* and that without such compensation the appropriation of private property for public uses, *no matter under what form of procedure* it is taken, would violate the provisions of the Federal constitution. To the same effect are *Henderson* v. *Central Passenger Railway*, 21 F. R., 358, and *Baker* v. *Village of Norwood*, 74 F. R., 997."

"No provision (was) made for compensation" to plaintiff in error in the act under which it was deprived of its property.

Judge COOLEY, in his discussion of the provisions of the fourteenth amendment, in chapter XLVII of the fifth edition of Story on the Constitution, says (2 Story on Con. (5th Ed.), p. 676, at pp. 702–703, Sec. 1956):

"The power to appropriate is subject to certain restrictions. It must not be exercised without making due compensation for whatever is taken. No more must be appropriated than is necessary, and if compensation is not agreed upon it *must be assessed by some impartial tribunal*, and cannot be arbitrarily fixed by state authority. In this, as well as in all other cases in which the owner may be deprived of his property by proceedings *in invitum*, the law authorizing such proceedings must be complied with in all its essential requirements, or p. oceedings will be ineffectual. (Citing *Williams* v. *Peyton*, 4 Wheat., 77; *Thatcher* v. *Powell*, 6 Wheat., 119; *Beaty* v. *Knowles*, 4 Pet., 168; *Early* v. *Doe*, 16 How., 610; *Rule* v. *Parker*, 1 Cooke, 365; *Parker* v. *Overman*, 18 How., 137.) Due process of law requires, *first*, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed, and, *secondly*, that the parties proceeding to make the appropria-

tion shall keep within the authority conferred and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waiver. (Citing: 1 Redfield on Railw., 239, 241; Cooley's Const. Lim., Ch. 15; Potter's Dwarris Statutes, Ch. 11.) The propriety of these rules is too obvious to require any discussion or elucidation."

To the same effect is

1 Hare's American Const. Law, pp. 347–348.

There is no pretense that in the case at bar any steps were taken to ascertain the value of the property rights of plaintiff in error upon the passage of ordinance of February 10, 1896.

That such ordinance does take the property of complainant without due process of law is also supported by the following cases:

*Mount Hope Cemetery* v. *Boston*, 158 Mass., 509.
*Sinneckson* v. *Johnson*, 17 N. J. L., 129.
*Gardner* v. *Newbury*, 2 Johns. Ch., 162.
*Harness* v. *C. & O. C. Co.*, 1 Md., Ch. Dec., 249.
*Martin et al. ex parte*, 8 Eng. (Ark.), 199.
*Henderson* v. *Ry. Co.*, 21 F. R., 358.
*Baker* v. *Norwood*, 74 F. R., 997.
*Davidson* v. *New Orleans*, 96 U. S., 102.
*Kentucky Railroad Tax Cases*, 115 U. S., 331.

New Memphis Gas & Light Co. v. City of Memphis 72 F. R. 952

We contend that the ordinance of February 10, 1896, does take the property of complainant *without due proces of law*, in this:

(1) The legislature through—'a collection of persons,'—a

body of men, authorizes such body of men, a party to a civil contract, to sit in judgment in its own case.

(2) The legislature, without making any compensation to plaintiff in error, takes the property rights of plaintiff in error, and surrenders and delivers them to defendant in error, the other party to the contract with plaintiff in error.

(3) If, as contended for by defendant in error, section 9 of the incorporation act applies to plaintiff in error, and not to individuals conducting business in like circumstances, then it imposes on plaintiff in error a burden which is not uniform upon all persons in like circumstances.

Therefore the ordinance of February 10, 1896, passed in pursuance of the act of the legislature of the State of Illinois passed in 1891, is in violation of section 10, article 14, of the amendments to the constitution of the United States of America.

Our only apology for this apparently lengthy argument is that we are here asking the reversal of a judgment of the highest court of the State of Illinois, whose decision, while entitled to the greatest consideration, we believe, is in contravention of the constitution of the United States, and we would be derelict in our duty in making such request did we not attempt to aid this court in its deliberations by a statement and elucidation of those principles and authorities which we believe lie at the foundation of the questions involved, and meet questions raised in argument below, and which we may, therefore, assume will be again urged here.

We think we have clearly demonstrated that the ordinance of February 10, 1896, passed in pursuance of the statute of 1891, did impair the contract of June 7, 1882, within the provisions of the Federal constitution which prohibits an im-

pairment of contracts; and that the property of plaintiff in error should not be taken without due process of law.

We respectfully submit that the judgment rendered in the case at bar by the Supreme Court of the State of Illinois should be reversed.

GEORGE C. FRY,
JAMES W. HYDE,
*Attorneys for Plaintiff in Error.*

GEORGE C. FRY,
*Of Counsel.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE FREEPORT WATER COMPANY,
*Plaintiff in Error,*

*vs.*

THE CITY OF FREEPORT,
*Defendant in Error.*

## REPLY OF PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

We beg leave to submit the following suggestions in reply to several points made by counsel for defendant in error.

(1) The "theme" which underlies, and around and upon which counsel builds his argument, and which repeatedly reappears, *namely:* that the ordinance of June 6, A. D. 1882, is an exclusive license, and therefore a monopoly; and that such ordinance contains an agreement that the city shall purchase the plant *or* extend the

franchise *upon the expiration* of said thirty years; was not raised in or by the special pleas of defendant in error. Defendant in error in arguing such propositions is simply *begging the question* presented upon the record for determination.

As stated by us, however, such question "does not arise, and should not enter into the determination of this case." (Arg., p. 78.) It is not a proper or necessary issue in the case.

The only question raised in the special pleas filed by defendant in error was as to the *power* of the municipal council of the City of Freeport to pass an ordinance under the "statutes of said State (of Illinois) relating to "water works," *re-establishing* water rates under and by virtue of the ordinance of February 10, 1896.

Such special pleas do not attack the validity of the ordinance of June 6, 1882, either for fraud or because such ordinance is too broad, or because such council has no power to pass such ordinance.

The ordinance of February 10, 1896, adopts and reaffirms the ordinance of June 6, 1882, except, only, to the extent of, and so far as relates to the water rates then sought to be re-established.

But, if counsel's contention were true, such agreement would simply have the effect of rendering the contract *pro tanto* invalid. It would not affect the remainder of the contract. (Authorities, Arg., p. 78.)

(2) It is not claimed by counsel for defendant in error that the ordinance of June 6, 1882, if it be a monopoly, is contrary to any constitutional limitation.

The cases cited by us (Argument, p. 77) cover this point.

(3) The fact that the ordinance creates an *exclusive* license does not render the contract void.

The cases of *Walla Walla Water Company* v. *City of Walla Walla*, 172 U. S., 1 (cited oy us at page 111); and *Cunningham* v. *City of Cleveland*, 98 F. R., 15 (cited by us at page 57), hold that if a municipality improperly grant an exclusive license, it is not thereby prevented from licensing others for the enjoyment of similar privileges.

To the same effect are the cases of *Lehigh Water Co.* v. *Easton*, 121 U. S., 388; *Biennville Water Co.* v. *Mobile*, 175 U. S., 109.

(4) The case of *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S., p. 685 (cited by counsel), is not *adverse* to our contention.

On the contrary, this case supports our contention that the property rights of plaintiff in error can only be taken by due process of law. In that case, the property of the water works was taken by the city. A statute authorized such taking. The value of the property rights of the water company so taken was, however, *first* ascertained by due process of law, *to wit*, by proper condemnation proceedings.

Respectfully submitted,

GEORGE C. FRY and
JAMES W. HYDE,
*Attorneys for Plaintiff in Error.*

GEORGE C. FRY,
*Of Counsel.*

OFFICE SUPREME COURT U.S.
RECEIVED
MAY 13 1901

No. 948.

Petition for Rehearing.

Filed May 13, 1901.

In the

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

FREEPORT WATER COMPANY,
*Plaintiff in Error,*
vs.
CITY OF FREEPORT,
*Defendant in Error.*

Cir. No. 7,858.
Term No. 948.

## PETITION FOR REHEARING.

GEORGE C. FRY,
JAMES W. HYDE,
Attorneys for Petitioner.

The Sterling Types Printing Company, 29 Madison St., Chicago.

29203

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

| | |
|---|---|
| **FREEPORT WATER COMPANY,** *Plaintiff in Error,* | Gen. No. 7,833, |
| *vs.* | Term No. 348. |
| **CITY OF FREEPORT,** *Defendant in Error.* | |

## PETITION FOR REHEARING.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the plaintiff in error in the above entitled cause, respectfully prays that a rehearing may be granted by this Honorable Court of said cause, in which a decision was rendered at the present term of this court, and, in support thereof, states the following grounds:

1. The case at bar was decided by the court under a misapprehension of the status of the case.

2. In its decision the court has not followed, but has departed from, well-established rules and decisions of this court, as to following the decisions of the state courts.

3. In construing the statutes of 1872, the court was under a wrong impression as to the status of the statutes

relating to water works, and the object sought to be accomplished, there being two separate acts, and has not given such statutes proper construction.

4. In the decision rendered on the question of the public policy of the State of Illinois, the court has given undue weight to certain decisions of the Illinois Supreme Court.

5. In construing the contract, this court has given to section 9 of the Illinois corporation act undue weight, when such section has no connection with, and does not relate to, the contract in question.

6. The court has overlooked the contention made by plaintiff in error, that the act of 1891 relates simply to contracts *in futuro*.

7. The court has gone further in its decision than the facts justify.

And your petitioner respectfully asks for an attentive consideration of the paper annexed hereto, in which an attempt is made to more fully state and support the grounds above mentioned, with such brevity, however, as the nature of the petition and the rule of the court requires, and your petitioner further moves that a rehearing of said cause may be had, pursuant to the rules and practice of this Honorable Court.

And, as in duty bound, your petitioner will ever pray, etc.

GEORGE C. FRY and
JAMES W. HYDE,
*Attorneys for Plaintiff in Error.*

We certify that, in our opinion, the foregoing petition for rehearing is well founded.

George C. Fry.
James W. Hyde
*Of Counsel for Plaintiff in Error.*

## GROUNDS UPON WHICH THE REHEARING IS ASKED, TOGETHER WITH THE REASONS IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

It is with great reluctance that we come before this Honorable Court, already overburdened with labor, and present this petition. But the extreme importance of the decision announced, which has had the effect of overturning vast property rights entered into with the knowledge of and at the instance of the the legislature of the state, and unquestioned by any legislative act or authoritative decision for a period of twenty years, as well as by reason of the closeness of the decision, not only in this court but also in the Supreme Court of the State of Illinois, and, after a careful examination of the opinion, believing that this Honorable Court has not properly construed the acts of the legislature in question, and the contract entered into thereunder, we beg leave to present for their consideration the following:

### I.

*First. The case at bar was decided by this court under a misapprehension of the status of the case.*

The court, in its opinion, says:

"The Supreme Court of the state based its decision on its opinions in the case of *City of Danville* v. *Danville Water Co.* (178 Ill., 299; 180 Ill., 255). In that case, the same statutes were involved as in the case at bar, and the contract which was claimed was based upon a substantially similar ordinance as that involved in the pending controversy."

Acting upon the principle that this court should "endeavor to avoid * * * any unseemly conflict with well-considered decisions of the state court," and, for the sake of harmony, "to incline to agreement with the state court," the decision of the court below was affirmed.

An examination of the opinion rendered shows that the decision of this court is based solely upon the reasons given by the Illinois Supreme Court in the Danville case, and not upon an interpretation of the contract placed upon it by the separate "independent judgment," of this court.

In rendering this opinion, the court has overlooked well-established principles decided in numerous of their own cases as to the extent this court will follow decisions of the state court.

The principle which underlies the reason for following the decisions of the State Supreme Court has never been extended by this court to the *specific* decision which is rendered by a state court *for the first time* and which decision is brought for its consideration, and is *then* under review by this court.

And herein lies the error upon which the decision in the case at bar was based, in that, although the Illinois Supreme Court had, in the Danville case (the same case going to the Supreme Court upon three separate appeals, 178 Ill., 299; 180 Ill., 235, and 186 Ill., 326), found against the contentions as now made by the plaintiff in error, yet this court has overlooked the fact that the *final* decision of the Illinois Supreme Court in the Danville case, which is now here for review, was submitted to, and considered by this court, *at the same time as and with the case at bar.*

This court holds, because of the reasons announced by the Supreme Court of Illinois, in its decision of the Danville case, the rights of plaintiff in error are foreclosed in this court, and when that same Danville case is brought here for review from the Supreme Court of Illinois this court further holds that the plaintiff in error in that case is foreclosed in this court "upon the authority" of the Freeport Water Company case here.

This court holds:

(1) That the Freeport case is determined by reason of decision of the State Supreme Court in the Danville case.

(2) That the Danville case is here determined by reason of the decision of this court in the Freeport case; therefore,

(3) The decision of the Danville case in this court is determined by the decision rendered in the Supreme Court of the State of Illinois in that same case.

This is the logical conclusion of the reasons given by the court for the affirmance of the case at bar, as well as the Rogers Park and Danville cases.

This argument is "reasoning in a circle."

The court are unmindful of the fact that the final decision in the Danville case should first be determined by the independent judgment of this court before they can say whether or not the principles announced by the Supreme Court in that case are to foreclose the rights of plaintiff in error in the case at bar. There was no separate, independent consideration by this court, either of the case at bar or in the Danville case, of the contract claimed to be impaired.

The final decisions, both in the case at bar and in the Danville case, were decided by the Illinois Supreme Court

at the same term, and opinions filed in each case on the same day (June 21, 1900). Writs of error were sued out from this court in each case, and made returnable to the same term, and by order of this court the cases were heard and submitted at the same time.

The decisions in the Danville cases reported in the 178 and 180 Illinois arose upon the pleadings. Those (Danville) cases were reversed *and remanded to the lower court for further proceedings in conformity with the opinions rendered.* It was not until the filing of the opinion by the Supreme Court of Illinois in the Danville case on June 21, 1900, that there was a *final judgment* therein from which a writ of error to this court could be prosecuted. Indeed in that case the Illinois Supreme Court say:

"Manifestly the only purpose of this appeal is to obtain a *final judgment* in this court *to enable appellant to take further appeal* if it should desire to do so."

The proceedings, as shown in the three reported decisions, were a continuance of but one case. It is the *final judgment* in that case that is now here on review. Until the entry of a *final* judgment in the state court the proceedings therein were still *in limine*, and, therefore, it cannot be said that a *binding* decision was entered therein, or that a course of decisions had been rendered in the state court, which had ripened into a rule of property, or from which the public policy of the state could be determined.

## II.

*Second. In its decision in the case at bar the court has not followed, but has departed from, well-established rules and decisions of this court as to following the decisions of the state courts.*

The rule of this court, as to following state decisions, is, as stated by Chief Justice Marshall in *Polk* v. *Wendal*, 9 Cranch, 87, that "this court adopts the construction of the state where that construction is settled and can be ascertained," and this rule has never been departed from. With that rule we are content.

But this court has never applied this rule to a decision of the State Supreme Court establishing a construction for the first time, and which specific decision is here under consideration and for review.

This rule applies only to those cases where state courts have rendered a course of decisions which have become a rule of property or a settled policy of the law.

It is stated in *Detroit* v. *Osborne*, 135 U. S., 492, that the decisions of the state court are not binding unless the state courts have construed "some law of a local character which may have become established by those courts, or has always been a part of the law of the state."

In *Sioux City R. R* v. *N. A. Trust Co.*, 173 U. S., 107, it is said this rule applies only when there is "a *binding* construction of such state statute by the courts of last resort in the state."

Mr. Justice Matthews says, in *Louisville, &c., R. R.* v. *Palmes*, 109 U. S., 244, it is only where such decisions have been "*so firmly established as to constitute*

*a rule of property* (that) such has been the uniform and well-settled doctrine of this court."

*Bank* v. *Knoop*, 16 How., 369.
*Gage* v. *Pumpelly*, 115 U. S., 454.

In other words, it may be said that this rule is applicable only where the state courts have built up a *course* of decisions upon the strength of which parties have entered into a contract, or where there is a construction of local statutes which do not raise any *Federal* question.

*Swift* v. *Tyson*, 16 Peters, 1.
*Fairfield* v. *Gallatin Co.*, 100 U. S., 47.
*Gormley* v. *Clark*, 134 U. S., 338.
*Lowndes* v. *Huntington*, 153 U. S., 19.
*Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S., 154.
*Castillo* v. *McConnico*, 168 U. S., 674.
*Nobles* v. *Georgia*, 168 U. S., 405.
*Sioux City R. R.* v. *N. A. Trust Co.*, 173 U. S., 99.
*I. C. R. R.* v. *Chicago*, 176 U. S., 659.

This court has repeatedly held that decisions of state courts made *after the execution* of a contract are not binding on, and do not control, this court.

In *Knox County* v. *Ninth National Bank*, 147 U. S., 99, in construing the statutes of the State of Missouri authorizing the execution of bonds as to the effect upon the issue of said bonds, it is said "these decisions were made *after* the issue of the bonds, *and cannot be deemed* controlling. *Cass Co.* v. *Johnson*, 95 U. S., 360; *Davies County* v. *Huidekoper*, 98 U. S., 98; *Douglas* v. *Pike*, 101 U. S., 677; *Carroll Co.* v. *Smith*, 111 U. S., 556."

To the same effect also are the cases of

*Bridge Proprietors* v. *Hoboken L. & I. Co.*, 1 Wall., 116.

*Mitchell* v. *City of Burlington*, 4 Wall., 270.

*Delmas* v. *Insurance Co.*, 14 Wall., 661.

*Johnson* v. *Waters*, 111 U. S., 640.

*Anderson* v. *Township of Santa Anna*, 116 U. S., 356.

The rule that this court follows state decisions does not apply to state decisions construing legislation enacted subsequent to the making of a contract or the vesting of a right or obligation.

*Anderson* v. *Town of Santa Anna*, 116 U. S., 356.

*Turner* v. *Wilkes County Com'rs*, 173 U. S., 461.

Nor does this rule apply to a case where there is a Federal question.

*Walker* v. *Marks*, 17 Wall., 648.

*Costello* v. *McConnico*, 168 U. S., 675.

*Remington Paper Co.* v. *Watson*, 173 U. S., 443.

Where there is a Federal question, it is the duty of this court *to determine for itself*, independent of the state court, whether or no there is a contract, and what that contract means.

*Anderson* v. *Town of Santa Anna*, 116 U. S., 356.

*Stearns* v. *Minnesota*, 179 U. S , 225.

(And other cases cited, Arg., 37.)

The rule as contended for by us is recognized in the case of *Burgess* v. *Seligman* (cited by the court), where the court say:

"The courts of the United States * * * endeavor to avoid, and, in most cases do avoid, any unseemly conflict with *the well-considered decisions* of the state courts."

Yet, in that case this court refused to follow the decision of the state court of Missouri construing the effect of the statute in the question before them for consideration, but held directly contrary to such decision, and affirmed the contrary construction placed upon the statute by the Circuit Court.

In the case of *Stearns* v. *Minnesota* (179 U. S., 225), which is one of the latest printed utterances of this court, they had no hesitancy in overruling the decision of the Minnesota Supreme Court then under consideration, because contrary to their own construction, and the court there say:

"The general rule of this court is to accept the construction of a state constitution placed by the State Supreme Court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a state through its legislation to make an alleged contract, and the meaning and validity of such contract, were matters which in discharging its duty under the Federal constitution *it must determine for itself;* and *while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract.*"

Indeed, in *Burgess* v. *Seligman* the court (Mr. Justice Bradley) says:

"It is not only the duty of the court to exercise its own judgment, 'but it would be *a dereliction of their duty*

*not to exercise an independent judgment in cases not foreclosed by previous adjudications.'"*

It is not claimed that there had been any previous line of decisions in the Illinois Supreme Court prior to that rendered in the Danville case.

The act authorizing the execution of contracts by a municipality for the supply of water was passed in 1872.

The ordinance of the City of Freeport was passed and accepted by Shelton in 1882.

The amendatory act of the legislature was passed in 1891.

The Danville case, which was submitted to the consideration of this court at this term, with the case at bar, was not a *binding* decision, until a final determination thereof in this court.

Therefore, when entering into the contract of 1882, Shelton "and assigns" were not foreclosed by any decision of the Illinois Supreme Court as in the case of *Wade* v. *Travis Co.*, 174 U. S., 509 (and in numerous other similar cases decided in this court).

This court, if consistent with the doctrine announced in repeated previous decisions, must construe this contract of June 7, 1882, as an *independent* question, not forestalled or foreclosed by any rule announced in any decision now here under review.

Even if the construction of the contract in question be "balanced in doubt" and there be an inclination to follow the opinion of the state court, such fact does not relieve the court from an independent examination of the question which comes up not as a review of a "course of decisions" of the state court, but as a separate and distinct decision of a State Supreme Court, the right or

wrong of which decision is here under consideration. This consideration we respectfully submit the case has not received.

## III.

*Third. In construing the acts of 1872, the court was under a wrong impression as to the status of the statutes relating to water works, and the object sought to be accomplished, there being two separate acts, and has not given such statutes proper construction.*

Although the Danville case was argued and decided below mainly upon the reserve police power, the decision was not rendered in this case because of such reserve police power.

The doctrine of *Munn* v. *People* is, therefore, not applicable to the case at bar. That such doctrine was not applicable to such cases was so held in *Pearsall* v. *Chicago Great Northern* (161 U. S., 647) and in *Walla Walla* v. *Walla Walla Water Co.* (172 U. S., 9), and the court does not say that the doctrines of those cases are not applicable.

What the court does hold is that there is an ambiguity in the words of the statute of April 10, 1872. This court here (as elsewhere in their opinion, adopting *totiem verbem* the language of the Supreme Court of Illinois in the Danville case), incorporates in the body of the statute the words "*time to time*," so as to make it read "at such rates as may *from time to time* be fixed by ordinance."

Prior to 1872 there were in existence in the State of Illinois but seven systems of water works supplying

municipalities with water, and these were owned and managed by the municipalities.*

As the country developed, and villages and cities grew, the demand for pure water for hygienic, as well as convenient purposes, increased.

The expenditure necessary for these improvements was large. Municipalities in the State of Illinois were limited by the constitution of 1870 as to the amount of the indebtedness which could be incurred for all purposes. (Sec. 12, Art. 9, Constitution 1870; Vol. 1, Starr & Curtiss' Stats., p. 182.) Little or no money could be raised by cities or villages for such purposes without exceeding the constitutional limit of indebtedness. The only way such water systems could then be built was by private capital.

The fact that individuals would not invest capital in water plants, except under a contract for a fairly long term of years, was universally known. The language of Mr. Justice Davis, in Binghamton Bridge Co., 3 Wall., 51 (decided in 1865), is most apt:

"The legislature, therefore, says to the public-spirited citizens, 'if you will embark with your time, money and skill in an enterprise which will accommodate the public necessities, we will grant you, for a limited period, or in perpetuity, privileges that will justify the expenditure of money and the employment of your time and skill.'"

This fact was fully recognized in *East St. Louis* v. *East St. Louis Gas L. & C. Co.*, 98 Ill., at page 426, where it was said it was because of the "difficulty of securing a contract for the construction of such expensive works as are here involved [could not be overcome] without the assurance of patronage for some considerable

* "The Manual of American Water Works, 1897," by M. N. Baker, Copyrighted 1897 (4th issue), page 361 *et seq.*

length of time; and in [by] the mention in the company's charter of *thirty* years as the time for the exclusive supply of the city with gas light."

The situation is clearly stated in the case of *The Illinois Trust & Savings Bank* v. *City of Arkansas City*, 40 U. S. App., 257:

"It is hardly possible that any individual or corporation could have been induced to expend the thousands of dollars required to construct such works as have been built in this city in consideration of the right to use the streets of the city for that purpose, and of the terms of rental for its hydrants for the limited term of a single year."

The same difficulty is also recognized in *Fergus Falls Water Co.* v. *City of Fergus Falls*, 65 Fed. Rep., 591; *Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 Fed. Rep., 663; *Blood* v. *Manchester Electric Light Co.*, 68 N. H., 340; *Maine Water Co.* v. *City of Waterville*, 93 Me., 586; and in numerous other cases cited and quoted from by us in our argument.

The court say, in *Arkansas City* case: "*These facts the members of the legislature must have known, and they undoubtedly granted this plenary power to construct for the very purpose of enabling the cities to procure a supply of water for their inhabitants*" for the full period of the authorized term "with covenants to pay rental for the like term."

Not only must the members of the legislature have known this fact, but for a continuous period of nearly twenty years, and until July 1, 1891, the legislature of the State of Illinois not only permitted but *invited* individuals, including plaintiff in error, to invest their money in water works upon the faith of the promise contained

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in the statute of the right to fix the rates for thirty years.

Upon the passage of the acts of 1872, and prior to July, 1891, there were instituted by private parties (individuals, companies or corporations) thirty-six different systems of water works, in more than that number of cities, at a cost of more than $5,000,000.*

The legislature had, prior to 1872, granted special charters to a limited number of corporations, giving them power to construct and maintain water works for long terms of years, but no *specific* authority was given such corporations to make long *time* contracts with a municipal corporation. Cities and villages were then governed

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*The Manual of American Water Works.

| City. | Cost. | City. | Cost. |
|---|---|---|---|
| Alton | $ 200,000 00 | Joliet | $ 275,000 00 |
| Belleville | 175,000 00 | Kankakee | 160,000 00 |
| Cairo | 100,000 00 | Kenilworth | 30,000 00 |
| Carlinville | 50,000 00 | La Grange | 180,000 00 |
| Carlyle | 35,000 00 | Lake Forest, | 75,000 00 |
| Cambridge and Urbana | 100,000 00 | Lewiston | 32,000 00 |
| | | Lincoln | 300,000 00 |
| | | Lockport | 5,000 00 |
| Chebanse | 3,500 0 | Mattoon | 100,000 00 |
| Pullman | 180,000 00 | Metropolis | 38,000 00 |
| Rogers Park. | 70,000 00 | Moline | 50,000 00 |
| Danville | 250,000 00 | Murphysboro | 75,000 00 |
| Dixon | 140,000 00 | Oak Park | 150,000 00 |
| East St. Louis | (not given) | Pekin | 100,000 00 |
| Elmhurst | 35,000 00 | Quincy | 475,000 00 |
| Freeport | 307,425 00 | Shelbyville | 100,000 00 |
| Galena | 75,000 00 | Sterling and Rock Falls | 150,000 00 |
| Galesburg | (not given) | | |
| Spava | 12,500 00 | Streator | 275,000 00 |
| | $1,733,425 00 | | $2,470,000 00 |

by special (as was defendant in error, Arg., 43) or general charters, which were not uniform in their powers, but which generally authorized municipalities "to provide the city with water." The constitution of 1870 of the State of Illinois required all laws thereafter passed to be uniform and of a general nature. The legislature thereupon commenced to revise the laws of the state. This revision resulted in the Revised Statutes of 1874.

Incorporated in these revisions are the acts of April 9th and 10th, 1872, and the revised act relating to cities and villages, which act was also passed on April 10, 1872.

The different powers and provisions of the special and general charters of cities and villages theretofore granted while acting thereunder could not be made uniform with the provisions of the revised city and village act of 1872. All the legislature attempted to do was to make them as nearly uniform as might be.

It is true that the statutes of 1872 are to be construed in *pari materia*, but it is also true that they are *to be construed in reference to the particular objects which they each severally were intended to accomplish.*

It was held in the year 1878 in the case of *The Chicago Packing & Provision Company* v. *City of Chicago*, 88 Ill., 223, where the Revised Statutes of 1872, relating to cities and villages, was under consideration, that:

"This act was not adopted for the City of Chicago, but for all cities and villages of the state that *might organize* under *or adopt* it as the fundamental law of their organization, and the sole source of their power. The General Assembly did not, nor could it, know that the City of Chicago would ever adopt the act as its charter. * * * The act being adopted, not for Chicago, but for all the cities adopting it, *we should, in construing it, not look to*

*the special charters* of the small municipalities having one thousand inhabitants and upward, *to give a construction to the general law.*"

It was further held in that case that the revised city and village act was *not an amendment* of the charter under which the city was then acting, and that this law "*must be regarded and construed as an independent act, without reference to, or as an amendment of*, all the special city and village charters of the state."

With the knowledge of and after the rendition of the decision in the *Chicago Packing and Provision Co.* case the legislature, in 1885, further modified the act of April 9, 1872, by inserting therein the words "any person or" so as to read, "Where water works may hereafter be constructed *by any person* or incorporated company."

Whether any or what cities might reorganize under the revised city and village act of 1872, the legislature of course could not tell. But the legislature, by their acts, a second time recognize our construction of these two statutes, that they apply to two separate classes of cities and villages when they endeaver to bring all cities and villages within *common* provisions as to powers to establish water works, when in 1891 they pass one of the acts under review when providing "that the corporate authorities of the city, town or village, *now or hereafter* incorporated under any *general or special* law of this state," etc.

That the two acts of 1872 are intended to apply to two *separate* classes of cities and villages is shown by the titles of the acts. The title of the act of April 9th is "An Act to enable cities and villages to contract for a supply of water for public use." (Arg., 34.) The title

of the act of April 10th is identically the same as the revised city and village act passed the same day, namely, "An Act to provide for the incorporation of cities and villages." (Arg., 34; 1 Starr & Curtis' Stat., p. 675, Pub. L. 1871, p. 259, as part of the city and village act.) The one act relates to cities then organized, and the other act to those cities which might thereafter be organized under the revised city and village act.

With this knowledge of the reason of the passage of two acts at the same session of the legislature apparently not in harmony, and, in reality, applying to two separate and distinct classes of cities and villages, viz.: (1) Those organized under previous special or general charters which might not avail themselves of the provisions of the act of 1872 relating to cities and villages; and (2) those cities and villages which should accept the provisions of that act, all apparent conflict in the provisions disappear. The acts are consistent with each other, and, in the light of these facts, and the situation at the time of their passage, there is no ambiguity as to the meaning of or in the construction of those acts, and no necessity of applying the doctrine *redenda singula singulæ*, as this court has done.

The act of April 9th applied only to municipalities then *in esse*. It did not apply to cities and villages which might thereafter be organized under the provisions of the Revised City and Village Act of 1872 (to which laws the act of April 10th was applicable). The act of April 9, 1872, shows that it was the intention of the legislature to authorize municipalities organized under charters then in force to provide (contract) for a supply of water in such manner as to them should seem best, for a period not exceeding thirty years. This court construes the act

of April 10, 1872 (which was intended to apply to one class of cities and villages), by the absence of some wording in another statute (intended to apply to another class of cities and villages).

The case of *Chicago Packing & Provision Co.* v. *People*, *supra*, holds that the act of April 9, 1872, is to be construed as an independent act, without reference to the charters of cities and villages organized under another act. Therefore there can be no aid "deduced" in construing the act of April 10, 1872, by reason "of silence in the statute of April 9, 1872."

If the two acts of April 9th and 10th are to be construed in *pari materia*, the same limitations must be applied to each of these acts. This, then, would make the act of April 9, 1872, read:

"The city and village authorities in such cities may (by ordinance from time to time) contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years."

There is no principle under which such words can be interpolated in the act of April 9, 1872. Courts do not make contracts for parties, be they municipal or individuals. Courts construe contracts as the parties make them. The language of the act of April 9, 1872, was plain, ample and absolute in its terms, with no restrictions, and capable of construction as contended for by us, and under such plain provisions of the statute many of the water companies in this state (including plaintiff in error) were afterwards organized, construing the statute as contended for by us.

The legislature of this state again in 1885 (after nearly one-half of the private water plants had been organized under the acts of 1872) re-enact in identically the same

language the statute of April 9, 1872, enlarging its terms to include individuals. Why did the legislature in 1885 a second time pass such act giving unrestricted and unlimited power to municipalities to "contract" for thirty years? It is admitted that the legislature had the power to pass such an act. There must have been some reason for leaving out the word "ordinance" in the act of April 9, 1872. That it was *intentional* and not an oversight, is shown in the fact that identically the same language is employed when re-enacting and enlarging the same act thirteen years afterwards in 1885. The only reason for leaving out the *interpolated* words in these two acts of April 9, 1872, and 1885, consistent with legal construction, is that the legislature intended such power to be untrammelled, unrestricted, save as to the length of the time for the making of the contract. There is no ambiguity in the wording or construction of this act. If a municipality could, under the provisions of the act of 1849 (or the special charter of Freeport, 1855) "provide the city with water for the convenience of the inhabitants" (Arg. 43), of what use are the words "for a period not exceeding thirty years"? Why specifically give the city power to make a contract when it already had such authority, and which authority necessarily implies the power to contract for *some* time. Unless the words "for a period not exceeding thirty years," in the act of April 9, 1872, shall be construed as of equal rank with the word "contract," then such words are useless, meaningless and *mere surplusage*, and do not give the municipality power to make any contract, which is the test of the words employed.

While the argument as to the act of April 9, 1872, does not determine the meaning of the language of the

act of April 10, 1872, still this court has deemed it necessary to support its construction of this act by relying upon the *absence* of the word "ordinance" from the act of April 9, 1872. The legislature, under the act of April 9, 1872, did not deem the word "ordinance" necessary to the execution of a contract. The power there given was not limited to an ordinance. It was not until 1891 that the legislature deemed an ordinance necessary. The court here limits the power given in the acts of 1872. Under what power can the court insert the word "ordinance from time to time" in the act of April 9, 1872, when the legislature did not deem such provision needed until nineteen years afterwards? The analogy ceases, and the apparent ambiguity disappears, when we understand the reason for the passage of the two acts.

The same reasoning which applies to the act of April 9, 1872, applies equally to the act of April 10, 1872. When the legislature gave power to municipalities to authorize the construction of water works, it gave the municipality authority to effectuate such power, in the only possible way, that is, by contract. Call the right acquired under this power a franchise, or what you will, it is too well settled in this court to require the citation of authorities to show that such right, when acted on, is a contract.

The court says, in its opinion in this case, "the clause 'for a period not exceeding thirty years' *qualifies* the words 'construct and maintain the same,' but does not *qualify* the words, 'at such rates as may be fixed by ordinance.'"

Undoubtedly the phrase, "as may be fixed by ordi-

nance," as well as the phrase, "and for a period not exceeding thirty years," each *relate* to the preceding words, "erect and maintain." The statement of the court that these phrases *qualify* such words is not correct grammatically.

The word "and" has not the quality of either an adjective or adverb, whose properties are to qualify or show degree. "And" is a copulative "conjunction that denotes addition."*

The word "and" does not qualify, *i. e.*, "modify, restrict, limit, restrain" (Webster), the words "erect and maintain."†

While this court recognizes rules of grammar, it has wholly disregarded the grammatical effect of the conjunction "and" in the clause "as may be fixed by ordinance, *and* for a period of thirty years."

Plaintiff in error has not claimed that the phrase "and for a period not exceeding thirty years" *does* qualify the clause "as may be fixed by ordinance." There was, and is, no claim that the conjunction "and" should

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*Brown's "Grammar of English Grammar" (10th Ed.), p. 430.
Fowler's "English Language in its Elements and Forms" (Ed. 1873), §375.
"The use of 'and' indicates that the new statement is superadded to, and distinct from, the previous."
Bardeen's Complete Rhetoric, CXIX.
And "is a particle which expresses the relation of addition."
2 Amer. & Eng. Ency. Law (2nd Ed.), 332, and cases cited.

†"Conjunctions *link together* words, phrases or sentences."
Brown's Grammar, p. 428, Obs. 2.
"Conjunctions have no *grammatical modifications*."
Brown's Grammar, p. 431, Obs. 7.
"Conjunctions themselves have no *government*."
Brown's Grammar, Rules XXII, Obs. 1.

be construed in other than its usual and customary sense.*

But plaintiff in error does claim that by giving force to, and construing the conjunction "and" grammatically, the phrase "*and* for a period not exceeding thirty years," as well as the phrase "as may be established by ordinance," are each of equal rank and order, co-ordinate with (and not subordinate to) the other. (Arg., p. 49.)

You cannot add to, or take from, either of these two phrases without rendering the other subordinate. The moment you attempt this you detract from the force, grammatical construction and meaning of the conjunction "and." This, under well-settled grammatical rules, cannot be done. If you construe either phrase as distributive you must so construe the other phrases. This would destroy all meaning of both phrases.

That words of a statute, as of a contract, should be construed according to grammatical rules, is not controverted.

That grammatical constructions extend to conjunctions is also admitted.

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*"Any two terms which are connected by a conjunction should be the same, or kind in quality, rather than different or heterogeneous."
Brown's Grammar, Rule XXII, p. 677, note 2.

"In general, only the same parts of speech should be united by conjunctions in the same construction."
Bardeen's Complete Rhetoric, CXIX.

"It is signified by the conjunction 'and' that the propositions *stand on the same basis* and both are to be asserted with the same degree of confidence."
Fowler's English Language in Its Elements and Forms, §376, p. 375 (1).

"When any words or terms are to be taken conjointly as subjects or antecedents, the conjunction 'and' *must* connect them."
Brown's Grammar, Rule XXI, p. 599, note 5.

Sentences and phrases "are connected in the way of co-ordination when they are not dependent one upon the other."
Fowler's English Language in Its Elements and Forms, p. 380.

See, also,

*Insurance Co.* v. *Dunne*, 19 Wall., 214.*
*Accident Insurance Co.* v. *Crandall*, 120 U. S., 527.†

The court, however, does not, in their decision, give to the conjunction "and" its recognized grammatical construction.

The court can give the conjunction "and" its true grammatical construction and meaning, and still construe it as relating to the words "construct and maintain." Such construction will not be conflicting or contradictory. The court should, in accordance with established rules of grammar, give the conjunction "and" its proper meaning, so as to make the clause "as may be fixed by ordinance" co-ordinate—of equal rank—with, and not secondary to, the succeeding clause "*and* for a period of not less than thirty years."

It is presumed the members of the legislature, when passing the act in question, were acquainted with well-established rules of grammar (as to which there is no conflict), and that they employed the language in the act of April 10, 1872, intelligently and intentionally.

Had the legislature intended that the words "from time to time" should be incorporated in either of the statutes of 1872, as this court by its decision now does, it would not have waited until 1891 before using these words. Their "absence" in the statute of 1872 and

*Where the court, construing the disjunction "or," hold the grammatical construction of the phrase "before final trial or hearing" to be "before final trial or *final* hearing."

†Where the court, again construing the same disjunction, hold the grammatical construction of the phrase "bodily infirmity of disease" to be "bodily infirmity or bodily disease."

their "presence" in the act of 1891 show that they understood their effect and gave a construction that cannot be gainsaid and is incontrovertible.

The uniform course of construction by the municipalities and legislative authorities, as well as the parties establishing water works under the acts of 1872, for the period of twenty years, should be entitled to great if not controlling consideration.

## IV.

*Fourth. In the decision rendered on the question of the public policy of the State of Illinois, the court has given undue weight to certain decisions of the Illinois Supreme Court.*

There was no declared policy asserted by the state as evidenced in an act of the legislature restricting a municipality in making a contract for a supply of water unless it be contained w thin the very terms and provisions of the acts of 1872.

The policy as outlined by the acts of the legislature was shown in our argument (p. 43).

Nor was there any declaration as to such public policy as evidenced in any decision prior to that rendered in the Danville case now here under review.

While this court cite the cases of *Stevens* v. *School Directors*, 87 Ill., 255, and *Davis* v. *School Directors*, 92 Ill., 293, as tending to such public policy, they admit that they do not establish such public policy. These cases only announce a well-established rule of the power of municipal bodies under their *implied* power, and in

the *absence* of any legislation whatever upon the subject. This is not the case at bar.

This court in their opinion say:

"*In East St. Louis* v. *East St. Louis G. L. & C. Co.*, 98 Ill., 415, decided in May, 1881, the doctrine of those cases was not adopted as applicable to a contract for gas rates, nor was it rejected. One justice (*dissenting*) asserted it with great emphasis, quoting those cases. The court, however, left it disputable, placing the decision on other grounds. There was at least admonition in those cases to persons entering into contracts with municipalities."

Because the court in that case neither adopted nor rejected the doctrine in the Stevens and Davis cases, this court (by implication at least) seek to establish the public policy of the state. Had it been germain, necessary or proper to have decided that question in the East St. Louis case, or had the court in that case passed upon that question, then this court might deduce from such decision the public policy of this state. The principle decided in the Stevens and Davis cases was not involved, did not arise, and was not necessary to be decided in the East St. Louis G. L. & C. Co. case. This the court admits. Because it was not necessary to decide that question, the State Supreme Court refused to pass upon such question.

Upon the question that the contract was objectionable, "as unnecessarily tying up the hands of the city council" for the period of thirty years, the court, in the East St. Louis Gas L. & C. Co. case, say:

"Whether this length of time of the running of the contract be a valid objection to it, *we deem it unnecessary to determine*, for the purpose of this suit, *and would not be understood as expressing any opinion* in that regard; for, admitting that the contract cannot be upheld in this

respect, it is an objection, we conceive, which applies only to the executory part of the contract, and has no application to the executed part of it."

The court decided that such question was not germain or necessary to the proper decision of the case before it, and after so holding whatever it might have said in regard to that question, it is well established, would have been mere *obiter dicta*.

*Carroll* v. *Lessee of Carroll*, 16 How., 275.
*Florida* v. *Schutte*, 103 U. S., 143.

The court, in the East St. Louis Gas & Light Co. case, gave the following reasons for their decision:

"So far as the contract has been executed it has been as one for the furnishing of the light during the pleasure of the city. Had the contract been in that form it would not have been obnoxious to the objection made to it. Courts should not destroy the contracts made by parties further than some good reason requires. Such an objection as it made to this contract, that it interferes with the exercise of the legislative or governmental power of the city over the subject, does not require that the contract should be held void, but only voidable so far as it is executory. It is enough for the obviating of any such objection that there be the right at any time to avoid the contract so that there may be the freedom to exercise its governmental power in regard to the subject when and as the city pleases. So far as the contract has been performed by furnishing light to the city without its disaffirmance of the contract it may be treated as if it had been a single contract for the furnishing of the light for the months in question alone, and one fully completed. The gas light having been furnished and enjoyed by the city without objection, it should pay for it. There was no interference with the exercise of any legislative or governmental power upon the subject. As well after the erection of a hospital or work house, or other needful building, or gas works, for itself, under a contract for such erection or construction, had one been made, might the city refuse to

pay therefor, because the contract, during the time of its running, was an abridgement of the city's governmental power to provide otherwise in respect to the subject-matter, as to refuse to make payment in the present case for the gas light which has been furnished. We do not see why there would not be as much force in the objection which is here made in the one case as in the other.

"There can be no doubt that it was within the scope of the authority of the city to contract upon the subject. There is nothing of illegality in the contract such as requires that it should be held void in the whole, the part performed as well as that not performed; and what the city has received and enjoyed the benefit of, under the contract, there is no principle of law which will justify it in its refusal to pay for.

"The general rule applying in such case is thus stated in 2 Parsons on Contracts, 790: 'A general rule has been asserted which certainly rests upon reason and justice. It is that where a party has accepted and made his own the benefit of a contract he has estopped himself from denying in the courts the validity of the instrument by which those benefits came to him.'

* * * * *

"In *Hitchcock* v. *Galveston*, 96 U. S., 341, the city council of Galveston had contracted with Hitchcock and others for the construction of certain sidewalks, to be paid for by the issue of city bonds. After the work was partly performed, the city council stopped the work and prevented its completion. The action was for this breach of the contract. It was objected that by reason of the supposed want of power to issue the bonds, the entire contract was void, and no action could be maintained for the breach thereof. The Supreme Court of the United States held that the city was liable to the extent of the work actually performed under the contract, even though it had no lawful authority to issue the bonds, and in discussing the subject said: 'It is enough for them (plaintiffs) that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to

assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments can not be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful.' Citing as in support of the decision the case of *The State Board of Agriculture* v. *The Citizens' Street Railway Co.*, 47 Ind., 407, where it was held that 'although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract.' See *Daniels* v. *Tearney*, 102 U. S. Rep., 415.

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"There is, at most, but a defect in power to make a contract running for so long a time, and we consider, in the circumstances of this case, that the doctrine above enunciated applies here with equal force *as in any case of a private corporation.*"

We have quoted so fully that the court may see that there was no intention or intimation to pass upon the question of public policy. All the court held in that case was that the city was liable on the contract made for the gas actually furnished to and used by the city under the contract as executed. So at bar; the water was furnished to, and used by, the city, under the contract made June 7, 1882.

Identically the same question was before the court in the Carlyle case (52 Ill. App., 577; Arg. 77). The Carlyle Company was organized in the year 1886, and fur-

nished the city water under an ordinance providing for water rates for a period of twenty-one years. The city refused to pay for the water. The water company sued and obtained a judgment for all the water furnished prior to the institution of the suit. The Appellate Court held in that case, as in the East St. Louis Gas Light and Coke Co. case, that it was not necessary to pass upon the question whether the ordinance was invalid, but affirmed the judgment against the city, on the authority of the East St. Louis G. L. & C. Co. case.

In neither case was it necessary to raise or decide the question of public policy, nor did the courts attempt to do so. In the East St. Louis G. L. & C. Co. case, the court expressly refused to pass upon the question, and the Appellate Court, in the Carlyle case, affirmed the judgment on the strength of the East St Louis G. L. &. C. Co. case.

No question of public policy of the state can be raised, much less established, from the decisions.

Moreover, no settled policy of the state can be established by the decision of an Appellate Court of the State of Illinois, because:

(1) There are five distinct Appellate Courts (four original and one branch court) in this state.

1 Starr & Curtis, Stat., Sec. 21, p. 1151.
Public Laws, 1897, p. 185.

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*One illustration will suffice:

*O'Donnell* v. *C. & A. R. R.*, 22 Ill. App., 237 (2nd Dist.), and *Aarvig* v. *Kellogg*, 21 Ill. App., 530 (2nd Dist.), hold one way on the proposition before them, and

*Steele* v. *Lovejoy*, 23 Ill. App., 575 (1st Dist.), and *American Ins. Co.* v. *Arbuckle*, 32 Ill. App., 371 (2d Dist.), hold *contra* on the same proposition.

As a practical proposition, where the same questions have been submitted to different Appellate Courts in this state, their decisions have frequently been in direct conflict,* and it was not until the rendition of a decision by the Supreme Court of the state upon such questions that a rule of property or public policy as to such questions could be held to have been laid down or established.

(2) By the act creating such courts, they are required to file written opinions in each case decided, but it is specifically declared that such opinion "*shall not be binding authority in any case or proceeding* other than that in which they may be filed." (1 Starr & Curtis' Stat., §37, p. 1155.)

This court, in *contravention of the provisions of the statute* of the State of Illinois, declares the public policy of the State of Illinois upon the strength of an opinion which is not binding on any court whatever, and disregards what must be conceded the established doctrine by great weight of, if not the almost unanimous line of decisions in the cases which have passed upon the authority of a municipality to make contracts to provide for water works upon long-time contracts. (Arg., pp. 45 to 72.)

(2) And here, in passing, we may notice the case of *Detroit Citizens Ry. Co.* v. *Detroit Ry. Co.*, 171 U. S., 40, which is cited by the court as determinative of the case at bar. That case is not at all analogous.

The case presented upon the record and pleadings, and upon which the court was called upon to pass, is not whether the contract executed is void because there was an *exclusive* license, as in *Detroit Citizens Ry. Co.* v. *Detroit Ry. Co.*, 171 U. S., 40, but whether or not plaintiff in error delivered to, and the defendant in error

received from, plaintiff in error and used and appropriated water furnished under a contract with the municipality executed under an act of the legislature authorizing a municipality to make a contract for such supply. Whether or not such contract is exclusive will not aid in the determination of the question before the court, and does not affect the questions at issue in this case, for if the provisions of the ordinance, so far as granting an exclusive right, is void it is well settled that the balance of the contract is valid.

That contracts such as the one at bar, although exclusive, may be made and be binding on a municipality, is admitted in the opinion.

So long as defendant in error receives water from plaintiff in error, then as to so much of the contract as is executed, defendant in error, under the authority of East St. Louis Gas Co. Case is liable to plaintiff in error for the price thereof.

V.

*Fifth. In construing the contract, the court has given to section 9 of the Illinois corporation act undue weight, when in fact such section has no connection with, and does not relate to, the contract in question.*

(*a*) Section 9 of the Illinois corporation act cannot apply and does not aid in the construction of the acts of 1872, 1885 or 1891.

It being conceded that the contract of June 7, 1882, was made between Shelton and the defendant in error, it must be further conceded that if Shelton, and not the Freeport Water Company, were here as plaintiff in error, section 9 of the corporation act would not be applicable.

This proposition ought, in itself, to be sufficient answer to the statement that the acts of 1872, 1885 and 1891 are to be construed by the aid of section 9 of the corporation act.

This court, however, after quoting from *Burgess* v. *Seligman* as to what rule should control the court in the construction of the contract in question, immediately proceed to discuss the provisions of this corporation act, and base their decision upon and adopt what the Illinois Supreme Court stated in the Danville case in reference thereto.

In addition to the reasons given by us that section 9 of the incorporation act is not applicable to the statutes of 1872, 1885 and 1891 (Arg., 93, 107), we show your Honors:

That the legislature did not intend that section 9 of the incorporation act should apply to the acts of 1872, 1885 and 1891, is proven conclusively by the fact that the acts of 1872, 1885 and 1891, by their terms, make the same applicable to "an incorporated company" (1872), and "person or private corporation" (1885), and "any individual, company or corporation" (1891). Why, if section 9 of the corporation act was intended to apply to these acts, should the legislature therein particularly specify not only individuals and companies, but also *corporations*, as coming within the provisions of those acts? The fact that corporations are specifically designated and included in these acts negatives the intention of the legislature to include them by reason of section 9 of the incorporation act. *Expressio unius exclusio alterius* is peculiarly applicable here.

If section 9 of the corporation act is not applicable to

Shelton, as it must be conceded it is not, and, therefore, not applicable to any other individual, under like circumstances and conditions, then this court, by the decision rendered herein, incorporates in (adds to) the contract made between Shelton and defendant in error, section 9 of the corporation act. In so doing, this court expressly holds that the legislature intended by the acts of 1872, 1885 and 1891 to authorize building and maintaining *two* separate systems under precisely similar circumstances, for the supply of water to a municipal corporation, *namely, one system* where water is supplied by individuals (or companies), and *another system* where water is supplied by incorporated companies. That there should be two such systems, one of which *should be* subject to the provisions of section 9 of the corporation act, and one which *should not be* subject thereto, surely could never have been the intention of the legislature.

Suppose Shelton had built and maintained the water system, say until 1887, and then transferred such system to plaintiff in error (a corporation), which had retransferred the same to Shelton in 1890 (or some other individual), and that Shelton (or such other individual) were the owner, and plaintiff in error, then, under this decision, there would be one rule of construction applicable to Shelton while he was the former owner and present owner, and another rule of construction applicable while the water company was owner, both being owners under similar circumstances. This court cannot be deemed to have held any such proposition, but this is the logic of its decision.

Suppose that, on July 1, 1872, a municipality (not organized under the revised statute of 1872 relating to cities and villages) had made a contract with a private

corporation (organized under a special charter prior to the adoption of the revised corporation act) for a supply of water for thirty years, can it be said that section 9 of the incorporation act would affect such a contract? Admittedly not.

The decision of this court would then make one rule of construction for corporations organized under general or special laws prior to 1872, and another for corporations organized after that act—both corporations, however, doing business under precisely similar circumstances. Then such act as to corporations would clearly be void.

This was so held in *Braceville* v. *People*, 147 Ill., 66. There, under an act of the legislature, it was provided that certain specified corporations (but not all corporations) should pay "weekly" all their employes "the wages earned within six days of the date of payment." This act did not apply to some corporations.

The court discuss the effect of section 9 of the corporation act, and while stating that section 9 of the incorporation act might control all corporations organized under the revised corporation act, yet the court expressly held that said section could not be used or applied unless the obligation sought to be enforced would extend or apply equally to all persons and corporations doing business under similar circumstances. And because such act applied only to *some* persons and corporations, but did not apply to all persons and corporations doing business under similar circumstances, such act was a special law, in violation as well of the provisions of the state constitution, which provide that all general laws should be of a uniform nature, as well also as depriving the injured party of his property "without due process of

law." The court, therefore, held that section 9 of the incorporation act could not be applied under the circumstances of that case.

This case is directly in point, and should control, for section 9 of the incorporation act has no application at bar.

We are not unmindful of the fact that the Danville case is the later utterance of the court, but the Braceville case was not referred to, distinguished or overruled in the Danville case, and such question was not necessary to be decided in the Danville case, and the Danville case is here on review.

If the acts of 1872 are to have the effect given to them by this court, they should be based upon sound principles of law. They do not need the aid or support of a statute that can have no possible connection with the question to be decided, as is section 9 of the incorporation act.

The case of *Beer Co.* v. *Massachusetts*, 97 U. S., 25, cited by the court in support of the opinion, is not a "happy" illustration of the rule to be applied to the construction of section 9 of the incorporation act, because in that case there was a clear distinction between the powers reserved under such statute, since the legislature not only provided that they might, from time to time, make "further provisions and regulations for the management of the corporation and government thereof," but the legislature further reserved the power to "wholly repeal any act or part thereof, establishing a corporation," reservations not found in section 9 of the Illinois corporation act.

Undoubtedly, a corporation originally accepting the provisions of the Massachusetts act would be bound by

any subsequent provisions repealing such act, tending to establish a public policy, and it was by reason of the provisions of the statute reserving the power to repeal and amend that this court rendered the decision in the late case of *Looker* v. *Maynard*, 179 U. S., 46.

Moreover, in the *Beer Company* case, the object sought to be accomplished was in the nature of a police regulation, under the legislative or sovereign powers of the state, and not the regulation of a business attribute of a municipality. The distinction is material.

But if section 9 of the corporation act is not intended to apply to the acts of 1872, 1885 and 1891, then *Beer Company* v. *Massachusetts* is not in point.

But even if in point, the power of repeal cannot deprive plaintiff in error of rights lawfully acquired prior to the passage of the act of 1891. (Arg. 86.)

## VI.

*Sixth. The court has overlooked the contention made by plaintiff in error, that the act of 1891 relates simply to contracts to be made in the future.*

This court further say, in the statutes

"there is no explict provision for repetitions of the power—none declaring the power a continuing one. Who now doubts this? If rights were claimed, and were pleading for a different interpretation, we might have to listen to them, but now, undisturbed by them, we yield to resistance to that meaning which the subject-matter demands, in the absence of negative words."

The logical effect of this holding is this:

The court construes the power *conferred* upon municipal bodies under the act of 1872 by the power *asserted*

in the act of 1891. If the authority conferred under the acts of 1872 was sufficient in itself to authorize the proceedings taken by the city in 1896, the provisions of the act of 1891 are useless, and do not throw any light upon the construction of the provisions of the act of 1872. If the acts of 1872 are not sufficient, in themselves, to authorize the execution of the contract with Shelton, then they are not in anywise affected by the act of 1891. The question for the determination of the court is, whether or not the statute of 1872, by its terms, is a continuing one. If it is not, then the unlawful assertion of that power in 1891 cannot cure the defect in power as to rights already accrued.

In its decision, and in construing the contract, this court, as did the Supreme Court of Illinois in the *Danville* case, fails to properly distinguish between the legislative or governmental powers of the state (or municipality) and the powers exercised while acting in its business or private capacity.

The authorities cited by us clearly show this distinction. (Arg., 54. 58.)

It is true, the court says, in speaking of the contract as interpreted by the state court, "a distinction was made between a contract which related to a governmental function, which the regulation was said to be, and a contract relating to franchises, which, though public in their nature, yet were not governmental, which a supply of water was said to be."

The court here admits that a contract for a "supply of water" is not governmental or legislative, but relates to the business or private capacity of the municipality, and it was on that ground that in the New Orleans cases (115

U. S.), and which have been subsequently followed, this court held that contracts establishing fixed rates for a definite term to be a valid contract.

If the legislature authorized a municipality to make a contract in its business capacity, then such contract is subject to the same rules of construction as were contracts of private individuals. (Arg., 54 *et seq.*)

That a municipal corporation may enter into a contract necessary "to enable it to carry out the powers conferred upon it," we have heretofore shown. (Arg., 47.) The right granted was to make a "contract" and this included all the incidents of a contract. As was said in *Braceville Coal Co.* v. *People*, 147 Ill., at page 75:

"The right to contract necessarily includes the *right to fix the price* at which labor will be performed, and the mode and time of payment. *Each is an essential element of the right to contract.*"

And here consists the difference between the principles as laid down in the Railroad Commission Cases, where all the "people of the state at large" are interested in the public highways and "works for supplying a city with water which are the *private* property of a city"; *a fortiori* the works of individuals supplying a city with water.

So, the case of *Smith* v. *McDowell*, 148 Ill., 51, involved a street in which the public are interested. These cases do not aid in construction.

Counsel for plaintiff in error presented and argued that the power conferred in the act of 1872 was not a continuing one, and urged upon the consideration of the court that the statute of 1891, under well-settled canons of construction, should be construed to relate solely to

such contracts as might thereafter be executed. (Arg., 73.)

This construction the court has overlooked or ignored.

The legislature was well content with the policy authorizing the ordinance establishing fixed rates for a period of thirty years. Most of the ordinances (as at bar) provided that the city might, at the termination of the contract (and in many cases prior thereto) purchase the plant.

It was not until the year 1891 when, by reason of the increased wealth and growing population, the legislature concluded to change the course of public policy as to water plants, by using apt words reserving the right to change the rates by ordinance, "from time to time," as to plants thereafter constructed, instead of having the rates fixed as to the plants thereafter constructed, for the full period of thirty years, or to such parties who may not have contracted for the full period of thirty years.

## VII.

*Seventh. The court has gone further in its decision than the facts justify.*

There is one other point in the opinion which, if correct, goes further than it should in passing upon the contention of plaintiff in error that its property was taken without due process of law.

The court gives, among the reasons for denying the contention of plaintiff in error, that it was deprived of its property without due process of law, in that the act of 1891 did not require giving notice to plaintiff in error of change in the water rates, that this is no longer an

open question in this court, by reason of the decision in *San Diego Land Co.* v. *National City* (174 U. S., 750). That is not a parallel case, and no analogy can be drawn from that case.

It is provided in and by the constitution of California that "the use of all water," etc., "is hereby declared to be a public use, and subject to the regulation and control of the state," the rates to be collected by any water company "*shall be fixed* * * * by the city council, * * * *in the month of February in each year*"; that such ordinances shall be passed "in the manner that other ordinances are passed by such body, and shall continue for one year." In that state water was a matter of *necessity* for the development and maintenance of agriculture. Hence the reason of declaring its use a public use. This constitution was in force when the San Diego Land Company was organized. That the water company took all rights acquired by it subject to these provisions of the constitution there can be no doubt. It was not there questioned that the ordinance was not passed in the *same* "manner that other ordinances are passed." This court, following the decision of the Supreme Court of California, held that, by the terms of the state constitution, water companies were not entitled to notice before fixing the rates in February of each year; as stated by the Supreme Court of California, "the constitution is self-executing, and *it does not require notice.*"

A different question is presented at bar, where the use of water was merely a public *convenience* and where at the time of the execution of the contract there was no constitutional or statutory provision that the legislature might establish rates.

If, as the court say, the wrongs claimed by plaintiff in error on this point is simply an "abstract" and not an actual injury, we should not be foreclosed by a decision clearly not in point.

The court gives the further reason, also, that because the averment in the plea of the defendant in error that the rates as established by the ordinance of 1872 were unreasonable, and the municipality thereafter sought to establish such rate, which, in its opinion, was reasonable, plaintiff's property was not taken without due process of law. The averment in the plea that the rates were unreasonable is entirely immaterial as to the issues before the court. If the municipality was granted the power to make a valid contract, and it did in fact enter into such a contract, then such contract must stand as made, unless set aside by proper proceedings instituted for that specific purpose. (Arg., 75.)

The court, in its opinion, says that the point made by plaintiff in error that municipalities are made judges in their own cases, "seems not to have been presented to the Supreme Court of the state, either in the case at bar or in the cases referred to by it, and upon which it based its opinion."

The point was directly made by Mr. Mann in his argument, when the Danville case was presented in the Illinois Supreme Court, but was passed over in silence by the court.

This same point was presented to the same court below in the case under the 2d, 4th, 7th and 8th errors assigned in that court (Pr. Rec., 28). The court below, in its opinion, say plaintiff in error assigned errors that both the ordinance of 1896 and the act of 1891 were "in violation of sec-

tion 1, article 14, of the amendments to the Federal constitution, as depriving plaintiff in error of property without due process of law." (Pr. Rec., 32.) Although this point was argued below, the court did not then pass upon it, basing its reason for affirming upon the Danville case.

We have endeavored, briefly, to present such points as appear to us not to have received the full consideration of the court.

Respectfully submitted.

GEORGE C. FRY and
JAMES W. HYDE.
*Attorneys for Plaintiff in Error.*

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Clerk.

No. 348.

Gen. No. 17833. Term No. 348

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1900.

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|---|---|
| *THE FREEPORT WATER COMPANY,* *Plaintiff in Error,* *vs.* *THE CITY OF FREEPORT,* *Defendant in Error.* | *Error to the Supreme Court of the State of Illinois* |

## BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

A. J. HOPKINS,
*Attorney for ~~Plaintiff~~ Defendant in Error.*

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Gen. No. 17833. Term No. 348.

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# SUPREME COURT OF THE UNITED STATES

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*THE CITY OF FREEPORT,*
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## STATEMENT.

The statement of the case for plaintiff in error made by counsel, to the extent set forth in their brief, is substantially correct. There are, however, some omissions of parts of the ordinances and pleadings that for a better understanding of the case should be sup-

plied as having a bearing upon the issues presented.

An important feature of Sec. 6 of the ordinances of the city of Freeport, passed June 6th, 1882, is omitted from the statement made regarding it in the brief. The section in full is as follows:

"The city of Freeport reserves to itself the right to acquire by purchase and become the sole owner of said water works, including all machinery, mains, pipes, buildings and peoperty thereto, appertaining at the expiration of thirty years from the first day of July, 1882, by giving at least six months official notice thereof to the owner or owners of said water works, upon paying therefor to the owners thereof the value of said property to be ascertained by appraisement as follows: Said city shall select one competent person, and the owner or owners of said water works shall select another, and the two persons so selected shall select a third, or, in case they cannot agree on such third person, a third person shall be appointed by the judge of the Circuit Court of the thirteenth judicial circuit of the state of Illinois, residing at that time furthest from said city of Freeport, and the three men so determined upon shall appraise the value of said property at its then cash value, which appraisement shall be binding upon both parties as to the value thereof, and said city shall have the right to purchase and become the absolute owner of said water works, and property at such appraised value and in case said city does not purchase and become the owner of said water works and property as aforesaid, at the expiration of thirty years from the first day of July, 1882, then all the rights and privileges in this ordinance granted to said Nathaniel Shelton or his assigns

shall be extended for a further period of 25 years, subject to the rights of the city to purchase as aforesaid, and subject to the same duties, liabilities, obligations and penalties as herein provided for." (Trans. Rec. page 9).

Defendant's first special plea, in addition to the statement made in said brief, alleges in substance that prior to the passage of the ordinance of February 10th, 1896, the City council of the City of Freeport appointed a committee of its members to confer with plaintiff in error with a view of fixing *reasonable, fair and just rates for water service*, and gave notice that existing rates were *unjust and unreasonable*, and that the city would no longer continue to pay the rates so fixed by the said original ordinance; that plaintiff in error refused to treat with said committee and did not reduce its rates so as to make them *just, reasonable and fair*, and that therefore the ordinance of February 10, 1896, was enacted, and that the rates therein fixed, both as to city and individuals, *were fair, just and reasonable.* (Trans. Rec. 23-24).

The second special plea avers, in substance, that the city of Freeport, on the 11th day of February, 1896, paid in full to plaintiff in error all rates and charges for water service, according to the ordinance of June 6th, 1882. That after the passage of the last mentioned ordinance, on to-wit, July 1st, 1891, by reason of then existing conditions in furnishing such water service, the rent, sales and charges in that ordinance became, and were, *unjust, unreasonable* and *oppressive*, to said city and its inhabitants, and so being *unjust and unreasonable* and so failing to agree with the plaintiff in

error as to *just, fair and reasonable* rates, said city enacted the said ordinance of February 11, 1896, and did in and by said ordinance adjust, fix and declare other just and reasonable rates for water service, and that the water rates, rents and charges therein fixed were and are *fair, just and reasonable.* (Trans. Rec. 25).

Three sections of the statutes of the State of Illinois, relating to water works, material to this controversy, are correctly set out in the brief for plaintiff in error (pp. 34-35). In connection therewith there should also be considered the amended statute of 1885 (Laws Ills., 1885, p. 64) which provides as follows: "That in all cities, incorporated towns and villages where water works have been or may hereafter be constructed by any person or incorporated company, the city, town or village authorities in such cities, incorporated towns and villages may contract with such person or incorporated company for a *supply of water for public use for a period not exceeding 30 years.*"

By the demurrer, put in by plaintiff in error, to the said special pleas, all the material facts set up in those pleas are admitted. Thus the controversy here is reduced to a legal one, depending upon what construction shall be put upon the provisions of the statute above referred to and the ordinances passed in pursuance thereof.

## II

## BRIEF OF THE ARGUMENT.

### I

### A

The fixing of water rates for the period of 30 years by the ordinance of June 6, 1882, was not a contract

with the city; nor was such ordinance binding upon it, as the corporate authorities had no lawful right to so bind the city for fixed water rates for the entire period. The act of June 6, 1891, is a valid exercise of legislative power, and the ordinance of the city of Freeport, passed February 10, 1896, in pursuance thereof, is valid and binding on plaintiff in error.

*City of Danville vs Danville Water Co., 178 Ill., 299.*

*Rogers Park Water Co. vs Fergus, 178 Ill., 571.*

*Ill. Trust and Savings Bank vs Arkansas City Water Co., 67 Fed. Rep., 196.*

*E. St. Louis vs E. St. Louis Gas Co., 98 Ill, 415.*

*Shepherd vs Milwaukee Gas Co., 6 Wis., 539.*

*Williams vs Mutual Gas Co., 52 Mich., 499.*

*E. St. Louis Gas Co., vs Griswold, 47 Ill., (Appl) 411.*

B

The several statutes of the state of Illinois herein considered, should be construed together and so reconciled, if in any way conflicting, as to deny municipalities the power to pass and enforce irrepealable ordinances, which tend to create monopoly and impose unnecessary burdens on their inhabitants.

*Cooley Const. Lim. pp. 232-233.*

*Dillon on Municp. Corp., Secs. 91-443.*

*Chicago vs Rumpff, 45 Ill., 95.*

*People vs Chicago Gas T. Co., 130 Ill., 268.*

*Greenwood on Pub. Policy, 180, 643, 554.*

C

1. It will not be presumed that the legislature, in granting powers to municipal corporations, intended to clothe them with power to create a monopoly, or to create exclusive or special privileges in favor of individuals or private corporations; nor to pass ordinances to subject the inhabitants thereof to needless, excessive and oppressive burdens.

*Lombard vs Stearns, 4 Cush. 61.*

*Greenwood on Pub. Policy, p. 317.*

*Hangen vs Albina L. & W. Co. (Org.), 14 L. R. A., 424. (28 Pacf. R. 244.)*

*Shepherd vs Milwaukee Gas Co., 6 Wis. 539.*

*Williams vs Mutual Gas Co., 52 Mich. 499.*

2. Any ambiguity or doubt arising out of the terms used by the legislature in conferring power, must be resolved in favor of the public. Every reasonable doubt of power is resolved against the grantee and the power denied. This is especially true as to grants and and franchises of special privileges.

*Coosaw Min. Co. vs State, 144 U. S., 550.*

*Seeger vs Meuler, 133 Ill., 94.*

*People vs Chicago Gas T. Co., 130 Ill. 268.*

*Davenport vs Kleinschmidt, 13 Pacf. 249.*

*Slidell vs Grandjean, 111 U. S. 412.*

*Dillon Municp. Corp. Sec. 89.*

3. While, as a proposition of law, the legislature can delegate certain powers to a municipality, yet as to any power the state itself cannot exercise, it cannot lawfully delegate to its agents.

*Beach on Pub. Corp. Sec. 554.*

*Chicago vs Rumpff, 45 Ill. 90.*

*Zanom vs Mound City, 103 Ill. 546.*

*Cooley on Municp. Corp., 340.*

D

It is within the power of courts to declare that a thing which is within the letter of a statute, is not governed by the statute, because not within its spirit, or the intention of its maker.

*Rector of Trinity Church vs U. S., 143 U. S. 457.*

*U. S. vs Kirby, 7 Wall 482.*

*Rockland Water Co. vs Camden, 80 Me. 544.*

E

1. If it can be maintained that a municipality in making a contract for supplying water, acts in a private capacity, as an individual and not as a sovereign, and that there are some rights under such contract which are beyond destruction by the legislature, yet as to others in the administration of such contracts, they are not beyond legislative authority and control,

*Wagner vs City of Rock Island, 146 Ill., 139.*

*Ruggles vs People, 91 Ill., 256.*

*Rogers Park vs Fergus, 178 Ill., 571.*

2. In contracting for a supply of water, a munici-

pality acts both in its capacity as a public corporation and also in an individual capacity. When acting in the former capacity the corporation is in the exercise of its police power.

*Dill Muncp. Corp. Sec. 246.*

*Hawthorn vs People, 109 Ill., 302.*

*Olmstead vs Morris, 47 N. J. L., 333.*

F

1. Corporations or individuals engaged in a business which affects the public, owe a duty to the public. Any unreasonable restrictions upon the performance of such duties are prejudicial to the public interest and in contravention of public policy.

*Syracuse Water Co., vs City of Syracuse, 116 N. Y., 167.*

*Illinois T. S. Bank vs Arkansas Water Co., 67 Fed., 196.*

*City of Chicago vs Rumpff, 45 Ill., 90.*

2. Supplying water to cities and villages is a business impressed with a public use. A business, so impressed, implies the right of the legislative authority, not only to fix maximum rates, but also to adjust and reduce such rates and charges.

*Rogers Park Water Co. vs Fergus, 178 Ill. 571.*

*I. C. R. R. Co. vs People, 95 Ill. 313.*

*Rosehill Cemetery Co. vs Hopkinson, 114 Ill. 209.*

G

1. There is much apparent conflict, in the numerously reported water works cases, regarding the powers and extent of the powers municipalities may exercise in establishing and fixing water rates. On principle, however, long time and irrevocable contracts for fixed rates and charges are condemned.

*DesMoines vs Water Works Co. 95 Iowa, 357.*

*State vs Gas Co. 34 Ohio, St. 572.*

*Zanesville Gas Co. vs 47 Ohio, St. 1.*

2. In a number of cases the courts have held that contracts for the supply of water or gas to a municipal corporation, at a fixed price, and for an unreasonable period of time, are invalid.

*Trustees vs City of Jacksonville, 61 Ill. (Appl.) 199.*

*Spring Valley Water Works vs Schottler, 110 U. S. 347.*

*E. St. Louis vs E. St. Louis L. Co. 98 Ill. 415.*

*E. St. Louis vs E. St. Louis L. Co. 47 Ill. (Appl.) 411.*

III

A

1. The ordinance of February 10, 1896, is not in violation of the provisions of Section 10 art. 1, of the constitution of the United States, as impairing the obligation of a contract.

*N. Y. & N. E R. R. Co. vs Bristol, 151 U. S., 556.*

*Ford vs Chicago Milk Shippers' Assn., 155 Ill., 166.*

*Cooley on Const. Lm., pp. 437, 438.*

*City of Danville vs Danville Water Co., 178 Ill., 299.*

2. The said amendatory ordinance of the city of Freeport, which is based upon the provision of the act of the legislature of June 6, 1891, does not tend to deprive the plaintiff in error of its property without due process of law. Nor is it unconstitutional.

*Munn vs Illinois, 94 U. S. 113.*

*Budd vs N. York, 143 U. S. 517.*

*Hawthorn vs People, 109 Ill. 302.*

*Ruggles vs People, 91 Ill. 256.*

*Long Island Supply Co. vs City of Brooklyn, 166 U. S. 685.*

3. The act itself provides a lawful tribunal for the protection of the property rights of the plaintiff in error, if unjustly assailed, or if attempted to be put in jeopardy.

*Act June 6, 1891, Laws of Illinois, page 85.*

*C. B. & Q. R. R. Co. vs Jones, 149 Ill. 361.*

*Hawthorn vs People, 109 Ill. 302.*

*San Diego Land Co. vs National City, 174 U. S. 739.*

4. All regulations of trade, with a view to the public interest may more or less impair the value of property, but they do not come within the constitutional inhibition, unless they virtually take away and de-

stroy those rights in which property consists. This destruction must be, for any substantial purpose, total.

*Munn vs Illinois, 94 U. S. 113.*

*Hawthorn vs People, 109 Ill. on page 309.*

B

Section 14, Art. 2, Constitution of Illinois of 1870, prohibits the irrevocable grant of special privileges and is a denial of the power to fix unalterable rates and charges for water to be furnished to municipalities and their inhabitants. So also does Section 9, Chap. 32 of the Act entitled Corporations.

*People vs Chicago Gas Co. 130 Ill. 268.*

*City of Danville vs Danville Water Co. 178 Ill. 299.*

C

The attempt by plaintiff in error to irrevocably establish a schedule of water rates and charges for the term of 30 years in pursuance of the said ordinance, is unauthorized by Section 1, Art. 10, Chap. 24, of the Revised Statutes, relating to corporations.

*Freeport Water Co. vs City of Freeport, 186 Ill. 179.*

*City of Danville vs Danville Water Co., 178 Ill. 299.*

The legislature may delegate powers to municipal corporations as a tribunal and agent of the law to fix reasonable rates and charges for a public service.

*San Diego Light Co. vs City of San Diego, 50 Pacf. R. 633.*

*English vs New Haven & N. Co. 32 Connecticut 240.*

*C. B. & Q. R. R. Co. vs Jones, 149 Ill. 361.*

*San Diego L. & T. Co. vs National City, 174 U. S. 739.*

III

## ARGUMENT.

I

Any decision reached in this case must be based upon the statutes, the ordinances and the pleadings set out in the record, and these should be construed under the law and decisions of the courts applicable thereto.

The material facts as set up in the special pleas of the defendant in error, are admitted by the demurrer. The case should then proceed as conceding that the rates and charges fixed for water service by the ordinance of June 6, 1882, were at the date of the passage of the subsequent ordinance of February 10, 1896, *unreasonable, unjust, and oppressive*, and that the rates and charges as fixed and determined in and by the latter ordinance, are *fair, just and reasonable.*

The contention of plaintiff in error, however, is that, admitting such facts to be true, the defendant in error cannot, as a legal proposition, obtain any relief therefrom during the time fixed in the ordinance, viz., 30 years. In this investigation no case has been cited, nor none we think, can be found, where the same provisions contained in this ordinance have been before this or any other court for construction and determination.

The anomalous features of this ordinance, when considered together, and in support of its claimed infallibility to change or modification, are *sui generis.*

By section 1 it purports to grant to Nathan Shelton, or his assigns the *exclusive right and privilege*, for the term of 30 years from the first day of July, 1882, of supplying the city of Freeport and its citizens with water. The rights and liabilities provided for in this ordinance, by section 2 *are to continue for a period of 30 years, unless sooner extinguished by purchase as thereinafter provided.* By section 6, there is reserved the right to the city of Freeport to acquire by purchase and to become the owner of such water works and property, at the expiration of 30 years from the first day of July, 1882, ~~when~~ otherwise "all the rights and privileges in this ordinance granted to said Nathan Shelton, or his assigns, *shall be extended for a further period of 25 years, subject to the rights of the city to purchase as aforesaid, and subject to the same duties, liabilities, obligations and penalties as herein provided for.*" (Rec. p. 9).

By section 7, it is provided that as an annual rental for the first 100 fire hydrants there shall be paid by the city the sum of $100.00 each; for all hydrants over 100, and up to 150, an annual rental of $80.00 each; and for all hydrants above or over the last mentioned number, an annual rental of $50.00 each. Such rentals are to be paid semi-annually, and the rent therefore to commence when each hydrant is set for use, and the city notified thereof, and shall continue "during the full term specified in this ordinance, unless said city shall sooner become the owner of said water works as hereinbefore provided, in which event said rental shall

cease." Then follows section 10, fixing maximum rates to consumers. The rates so fixed, both for hydrant service and service to consumers as before stated, are confessed to have been *unfair*, *unjust and oppressive*, at the time of amending the original ordinance.

It may safely be asserted here that no case can be found where an ordinance, or a contract, if you please to call it such, for supplying a commodity for general use, and which is impressed with a public service, containing the exclusive, irrepealable, unalterable and monopolistic features sought by this ordinance to be imposed upon the city of Freeport and its inhabitants, has been upheld by any court of final resort.

The line of argument pursued in the brief for plaintiff in error will not be followed, because it is hoped that this argument may be thus much abridged. Nor is it the purpose here to cram this brief or argument with an avalanche of cited authorities, which, if not ignored by the court, would impose upon its members a useless burden. It is to be hoped therefore that the paucity of cases cited to sustain the positions here assumed by defendant in error, as also the brevity in argument, will not be construed as a confession on the part of counsel for defendant in error that the positions taken are doubtful or untenable.

A

Lying at the threshold of this discussion, and involving one of the vital points in the case, is the denial of plaintiff in error of the right of the legislature of the State of Illinois, or of the city authorities of the city of Freeport, to in any degree change, alter or impair any

of the express provisions of the ordinance of June 6, 1882.

It is here contended that this ordinance, regardless of said legislative act of July 1, 1891, is not a valid enactment, in so far as it attempts to create an exclusive privilege by fixing unalterable water rates and charges for the period of 30 years; and further, in so far as it extends and protects the monopoly thereof, by denying the right of the city to purchase the plant until the expiration of that time. In case the city should not be in a situation to purchase, such misfortune would subject the city and its inhabitants to the onerous burden of paying these unfair and unjust charges for water service *for the full period of another term of 25 years.*

It seems to be admitted in the brief for plaintiff in error that the ordinance of June 6, 1882, is invalid, to the extent of granting *an exclusive privilege* (page of argument 78), but it is contended that the defendant in error, having enjoyed the benefits derived from the water furnished, is liable therefor under a *quantum meruit.* But plaintiff in error in this action is seeking to recover the price mentioned in the so-called contract, and not for what the water furnished thereunder was reasonably worth. The point sought to be made by counsel is not very clear.

It is true that the legislature of the state of Illinois has, by statutes enacted, authorized cities and villages to provide for a supply of water. Soon after the adoption of the present constitution of said state, April 9th, 1872, an act was passed providing that when an incorporated company should construct water works, cities

or villages might contract with such incorporated company for a supply of water, for a period not exceeding 30 years. On April 10, 1872, at the same session of the legislature, the act was passed under which plaintiff in error claims to have contracted for the furnishing of water to the city of Freeport, which so-called contract is the vital controversy in this case.

B

It is a familiar rule in construing charters and grants of power to municipalities, and "the general disposition of the courts in this country has been, to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them, thus applying substantially the same rule that is applied to charters of private incorporations. The reasonable presumption is that the state has granted in clear and unmistakable terms all it has designed to grant." *Cooley on Const. Lim. page 232.* The same author says: "It must follow that, if in any case a party assumes to deal with a corporation, on the supposition that it possesses powers which it does not, or to contract in any other manner than is permitted by the charter, he will not be allowed, even though he may have complied with the undertaking on his part, to maintain a suit against the corporation based upon its unauthorized action."

"The extent of the power of municipalities, whether expressed, implied or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is that while the construction is to be just, seeking first of all

for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the state or general public, and against the grantee." *Dillon on Corp. Sec. 91.* The text of this author has been so frequently approved by the courts that no especial reference thereto is necessary.

If the contention for the plaintiff in error be conceded that the two provisions of the statute, passed at the session of the legislature of 1871, should be construed in *pari materia*, then, keeping in mind the above canon of construction, it will be seen that by the act of April 9, 1872, a general power is given to cities and villages of the state to contract with an incorporated company for a supply of water for public use for a period not exceeding 30 years. The act of April 10, 1872, article x, is a part of the general incorporation act relating to cities and villages, under the title of "Water Works," section 1 of which is claimed by plaintiff in error to authorize the ordinance granting the power to make the contract in controversy. The first mentioned act was amended, both in title and body, by an act in force July 1, 1885, which provides, section 1, "That in all cities, incorporated towns and villages where water works have been, or may hereafter be, constructed by any person or incorporated company, the city, town or village authorities in such cities, incorporated towns and villages, may contract with such persons or incorporated company for a supply of water for public use, for a period not exceeding 30 years."

Thus is plainly indicated the legislative intent and

meaning, in the passage of the act of April 10, 1872, to provide that 30 years was intended as the maximum term of the contract, but it does not indicate an intention to give the right to fix unalterable rates and charges for water furnished for that period.

The verbiage of section 1 of the act of April 10, 1882, is confusing and uncertain. It may, however, be fairly and reasonably construed in harmony with other legislation, and to express the evident legislative intent, to authorize any person or private corporation to construct and maintain water works for a period of 30 years, at such rates for water service as may be fixed by ordinance.

Counsel for plaintiff in error go into a philological discussion to give a construction to this section, but it seems that a fair and reasonable interpretation thereof, under the rules applied to legislative grants, is more practical and consistent.

C

1. It will be presumed that the legislature, in passing the act of April 10, 1882, was familiar with the extent of legislative power in such cases, and did not intend to enact a void law; that they were familiar with the rule of limitation, as stated by Mr. Dillon in his work on Municipal Corporations, sec. 97, that municiple corporations, as well as legislatures, "cannot make contracts which shall cede away, control or embarass their legislative powers."

2. The fact that the meaning of this section of the statute is in doubt and requires construction, amounts to a denial of the rights claimed under it by the plaintiff

in error, that municipal corporations are authorized by it to fix unalterable rates for water service for the period of 30 years.

3. But it is claimed by plaintiff in error that, independently of this statute, the city of Freeport, under a grant of general powers providing for the construction of water works, had the implied power to make a contract by ordinance like the one in question. This contention is denied by defendant in error for the reasons following: (1) If lawful, the power must be conferred by an express and unambiguous grant of the legislature. (2) The legislature had not power to make such a contract for itself, and any general grant made by it to a municipality would carry with it no implied authority to make the contract. (3) The ordinance or contract is an attempt to deprive the municipality of its sovereignty over a matter of public concern—a surrender of its governmental powers to a corporation and an abdication of its police power in a matter of public welfare, to the injury of its citizens.

The statute of June 1. 1891, is invoked to create a a special and exclusive privilege to collect fixed rates and charges, which are confessed on this record to be unjust, unfair and unreasonable, for the full term of 30 years, and if the corporation then becomes impoverished by these exorbitant charges, the monopoly is to be continued for another term of 25 years.

Before a doubtful statute, as the one in question is conceded to be, is held to grant a power so vicious to the public welfare, the reading of the statute ought to confer it by explicit and unambiguous words. In construing a con-

tract or ordinance of the town of New Lots, which authorized a water company to erect and maintain water works for supplying the town with water for the term of 25 years at a special rate for hydrants, it was claimed by the water company that its contract was inviolable and not subject to impairment by proceedings in condemnation. The court in *L. I. Water Co. vs City of Brooklyn, 166 U. S 685*, denied the claim and held that the contract or ordinance created no exclusive privilege. The Court say: "The contract in terms contains no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contains a covenant on the part of the town to pay certain hydrant rental. *But grants from the public are strictly construed in favor of the public*, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege. [Then follows citations of authorities]. Nor is there anything in the act of annexation which made a contract or created a right beyond the power of the legislature to change. It gave the city the right to purchase or condemn at any time within two years, but this specifffcation of time did not operate to prevent the legislature from enlarging the time, or from granting, at any subsequent period during the life of the contract, a further right of purchase or condemnation. No consent was asked of the town company in the act of annexation; it entered into no new contract; nothing was done to enlarge the rights which it had against the public. The act was simply one of legislative discretion in respect to municipal organization, and, like any other such act, *subject to future modification by the legislature.*"

The plaintiff in error could not carry on the busi-

ness of supplying water without the franchise, and it will be held to the performance of such duties as are incident to the service it undertook for the public. That duty was supplying the city and its inhabitants with water on equal terms and at reasonable rates. Says Mr. Morwartz in his work on Private Corporations, Sec. 1129, "It may be laid down as a general rule that whenever the aid of the government is granted to a private company, in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. * * * The same rule applies to companies invested with special privileges, at the expense of the public, for the purpose of supplying cities with water."

2. It is claimed, however, by plaintiff in error that aside from this ordinary rule regarding the duties of corporations, in dealing with the public, this corporation had the authority for the supposed contract by the statute of April 10, 1872, for fixing rates for water service during the full term of thirty years. This statute, in three cases hereinbefore, referred to, was before the Supreme Court of the state of Illinois, and it was held by that Court in these cases that the statute did not authorize the making of a contract for unalterable rates for long periods of time.

In the case of *City of Danville vs Danville Water Company, 178 Ill., on page 312*, the Court say: "The acts of April 9, 1872, and the city and village act of April 10, 1872, both passed at the same session of the

legislature, and relating to the same matter, so far as section 1 of article 10 above quoted is concerned, are in *pari materia* and should be construed together. (*South Park Comrs. vs First Nat. Bank of Chicago, 177 Ill, 234*). Said section 1 authorizes the city council to empower a private corporation to construct and maintain water works, at such rates as may be fixed by ordinance. The meaning of this language is, not that the water works are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause, "for a period not exceeding thirty years" qualifies the words, 'construct and maintain the same,' but does not qualify the words, 'at such rates as may be fixed by ordinance.' In other words, the city council may authorize a private corporation to construct and maintain water works for a period not exceeding thirty years, and they may authorize a private corporation to construct and maintain the water works at such rates as may from time to time be fixed by ordinance. The evident meaning of section 1 is, that there was to be reserved to the city council the power to fix the rates by ordinance at such figures as should be *fair and reasonable.* If the rates were to be fixed by ordinance, they could only be fixed by such ordinance, as was legal and whose passage was within the power of the council. A legislative body cannot part with its powers by any proceeding, so as not to be able to continue the exercise of such powers. It has no authority even by contract to control and embarrass its legislative powers and duties. (*Greenwood on Public Policy, p. 317; Cooley's Const. Lim. p. 206; 15 Am. & Eng. Ency. of Law, p. 1045; 1 Dillon on Mun. Corp. sec. 443*)

This construction of the statute is questioned by plaintiff in error. Its counsel then proceed to give a so-called "grammatical construction" of the act and mistakenly assume that counsel for defendant in error does not seriously deny their grammatical construction of the act. The need of a construction suggests a doubt as to its meaning. So the Illinois Supreme Court gave it a construction as shown in the opinions rendered, and this construction may be sustained both upon principle and authority.

The case of *Coosaw Min. Co. vs State, 144 U. S., 451*, is much in point here. There the contention was that a statute then under consideration might be susceptible of two constructions. The Court in the opinion say: "If the act of 1876 is fairly susceptible of the two constructions we have indicated, as we think it is, the interpretation must be adopted which is most favorable to the state. The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. (Citing a long line of cases). *Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by mere implication.*"

So in the case of *Slidell vs Grandjean, 111 U. S. 412*, the Court, in the opinion, say: "It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will

support the claim of the government rather than that of the individual. *Nothing can be inferred against the state.*"

These cases are supported by that of *Seeger vs Mueller, 133 Ill., 86.* "Municipal corporations have no powers which are not conferred on them in express terms, or by a fair implication. Any ambiguity or doubt arising out of the term used by the legislature in conferring their powers must be resolved in favor of the public. *A fair, reasonable doubt concerning the existence of a power is resolved against the corporation, and the power is denied.*"

3v. It will not be here disputed that the legislature can delegate its powers to a municipality. Yet it is contended that any power the state cannot exercise itself, cannot lawfully be delegated to its agents. The granting of special privileges and immunities is inhibited by the constitution of the State of Illinois. The legislature cannot confer upon municipal corporations power to barter away its governmental powers, nor can the state itself surrender certain of its governmental powers, especially its police power, to prevent the enforcement of a common law duty to regulate rates, tolls and charges by a corporation in the exercise of a public service. Ordinances made in pursuance of an attempt by the legislature to surrender or grant such powers to municipal corporations are invalid.

"All ordinances must be general in their character; must not be in violation of law, contrary to public policy, *or unnecessarily oppressive*, and must not unjustly, or arbitrarily, discriminate between citizens of the same

class." *Zanone vs Mound City, Supra.*

Mr. Cooley, in his work on Constitutional Law, page 340, says: "It has also been intimated in a very able opinion that the police power of the state could not be alienated, even by express grant. And this opinion is supported by those cases where it has been held that licenses to make use of property in certain modes may be revoked by the state, notwithstanding they may be connected with grants and based upon a consideration," and refers to *Thorpe vs R. & B. R. R. Co., 27 Vt. 140.*

Mr. Greenleaf in a note to his edition of Cruise on Real Property, Vol. 2d, page 67, says upon the subject of legislative powers, "They are entrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature disabling itself from the future exercise of powers entrusted to it, for the public good, must be void, being in effect a covenant to desert its paramount duty to the whole people."

D

The rule that the word or the letter of a statute does not necessarily govern in its construction, should here be applied. A construction of the several statutes of the state of Illinois relating to water works, and to a supply of water thereby to cities and villages, seems plainly to show that the intent of the legislature was not to allow contracts to be made for fixed rates for water service for a term of 30 years.

Upon this question, as manifesting the legislative

intent, are numerous acts of the legislature of that state relating to the regulation and control of corporations in the performance of a public service. In harmony therewith numerous decisions are to be found in the reports of the courts of that state construing doubtful provisions of statutes which were claimed to confer corporate rights and privileges, in which it is declared that persons and corporations, in rendering a public service, cannot maintain fixed, exorbitant or unreasonable rates and charges, which are beyond legislative control. Thus these water works acts, as manifesting their spirit and the intention of the legislature in their enactment, should be considered in the light of this legislation, and of these decisions.

The rules of construction adopted by other courts in such cases, justify the conclusion reached in these cases by the Illinois courts.

In the case of *Rector of Trinity Church vs United States, 143 U. S., 457*, the Court say: "It is a familiar rule that a thing may be within the letter of the statute and not within the statute, because not within its spirit nor within the intention of its maker. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislature, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable

to believe that the legislator intended to include the particular act."

In *United States vs Kirby, 7 Wall. 482*, in construing a statute there in controversey, the Court say. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf that the Bolognian law which enacted 'that whoever drew blood in the street should be punished with the utmost severity,' did not extend to the surgeon who, opened the vein of a person that fell down in the street in a fit."

This rule is also pointedly and correctly stated in the case of *Rockland Water Company vs Camden Water Co., 80 Me. 544*, "That one who claims a franchise or exclusive right or privilege in derogation of the common right of the public, must prove his title thereto by a grant clearly and definitely expressed, and cannot enlarge it by equivocal or doubtful provisions or probable inferences. *Every reasonable doubt is to be resolved adversely.* Nothing is to be taken as conceded, but what is given in unmistakable terms, or by implication equally clear. *The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare.*" This branch of the case is now left for the consideration of the Court, upon

the suggestions and authority above mentioned.

E

1. It is said to be difficult to define with precision what limitation exists upon the power of the legislature over municipal corporations as ordinarily constituted. It is doubtless true they may make contracts which are beyond legislative destruction, yet the legislature may regulate or change the use of property which comes under the control of such corporation.

In the case of *City of Quincy vs Bull, 106 Ill. 337*, an ordinance of the city was under consideration, which was in the nature of a contract for supplying the city with water. It was held, that in so far as the ordinance provided for the use of the streets for laying pipes and for putting in of the water works, the city had power to make a binding contract with Price for that purpose. The question was further presented, whether so much of the ordinance as provided for the compensation which the city agreed to pay for the period of 30 years was valid and binding on the city. The Court in the opinion cautiously avoided the latter question, but intimated that the ordinance might be deemed invalid in that particular, but as there was no attempt at recovery from the city for the price of water on the basis of the contract rate, no opinion was expressed on that question.

It was held in the case of *Wagner vs City of Rock Island, 146 Ill. 139* that the city, in providing for a system of water works by procuring water from some permanent source of supply and distributing it by means of pipes laid in the streets, though not an exercise of the power of sovereignty, was undoubtedly a business,

private in its nature, and "belonged to that class of occupations or enterprises upon which a public interest was impressed."

In *Ruggles vs People, 91 Ill., 256*, the Court, in speaking of the charter of a company which was claimed to be a contract with the state for the fixing of rates and tolls, say: "But does this express grant change the power to control, or does it confer unlimited power, or is the grant made with implied limitation that in fixing their rates and tolls they shall be reasonable? The fact that the grant and the acceptance of the charter constitute a contract, does not solve the question; like any other contract it is subject to construction." This case was affirmed on writ of error to this Court. *Ruggles vs People, 108 U. S. 526.*

2. The city of Freeport, as an agent of the state in providing for a supply of water, was acting in its capacity as a public corporation, and in fixing rates and charges was exercising rights which appertained to its police powers.

"If the supplying a city or town with water is not a public purpose, it is difficult to conceive of any enterprise entrusted to a private corporation that could be classed under that head," said *Justice Van Syckle in Olmstead vs Morris Aqueduct Co., 47 N. J. L., 333.*

F

1. In view of what has been said and shown in the preceding part of this argument, it may be confidently claimed that the supplying of water to cities and villages by municipal corporations is a business impressed with a public use. Restrictions placed upon any

duty connected with such business, which are prejudicial to the public interests, are in contravention of public policy and invalid.

2. There is no doubt of an implied legislative authority allowing a municipal corporation, in supplying water to cities and villages, to fix maximum rates, as well as to adjust and reduce unreasonable and unjust rates. Such power may be implied, without conferring the right to such corporation to fix unalterable rates and charges for long periods of time.

In the case of *Illinois T. and S. Bank vs Arkansas City Water Co., 67 Fed. 196*, a contract for supplying the city of Arkansas City with water, and fixing rates for such supply for a period of 21 years, was, under consideration by the court and it was there held that it would not follow "that the attempt to grant such exclusive privilege for a fixed period of time would render the entire ordinance illegal. On the contrary, all that this Court now decides is, that the city is not bound to accept the service tendered by the water company for any definite and fixed period of time, but under contract made in pursuance of an ordinance legally adopted, the city should be held to pay the stipulated price, so long as it accepts the service offered in pursuance of the contract." The Court further say in the opinion: "The right to furnish water for public and domestic use within a city is a public service, and of such high consequence to the public that it should at all times remain open to the control of the city council for the benefit of the public. The contract here insisted upon would place the matter beyond control of the council for a long period of time. *This is*

*in the nature of an attempt to create a monopoly*,—a power which the city council never possesses, unless it is delegated in clear, unmistakable terms." Here the Court questions the right to contract for the supply for a term of 21 years. But assuming, and it is not denied, that under the statute of the State of Illinois, cities and villages are authorized to contract for water supply for the period not exceeding 30 years, this case is authority to show how jealously the rights of the public are regarded in this class of service to the public.

The opinion further refers to the burden that the upholding of this contract would impose upon the city and says: "If this claim for hydrant rental for fire hydrants located upon extensions to the original plant, is upheld, it fixes a charge of about $8000.00 annually upon the defendant city. So great a charge upon the revenue of the city must rest upon some well authenticated enactment of the common council of said city, or upon *a binding and subsisting contract*, in which the right, duty, and liabilities of the respective parties are clearly defined and set forth."

So in the case at bar. If the ordinance of June 6, 1882, can be upheld as a contract binding the city of Freeport to a fixed rate for the full period of 30 years, it fixes a charge of $11,680 annually upon the city of Freeport. So before a charge of that magnitude upon the revenues of the city should be upheld, it ought to rest in some well defined delegated power from the legislature of the state to cities and villages to authorize it. As has been heretofore discussed and claimed in this argument, the statute invoked by plaintiff in error, to uphold this power, does not justify it.

In the case of *City of Chicago vs Rumpff, 45 Ill., 90*, the Court in speaking of the powers of municipal corporations, say: "Municipal corporations are only created for the better government and protection of local communities in the enjoyment of their rights, than can be afforded by general law. The powers which they are authorized to exercise, are delegated to them to afford more ample protection to the community in their rights and privileges. Such bodies are never created to enable them to confer pecuniary benefits, or to grant monopolies to any portion of communities, or to individual members thereof. * * * It is believed, that the result of the authorities warrants the assertion that corporate franchises, whether municipal or private, are conferred in trust for the benefit of the entire body of corporators, and must, like all other trusts, be exercised with prudence and discretion. Hence, their by-laws must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interests of the corporation, are void. And of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly."

In the case of *I. C. R. R. Co. vs People. 95 Ill., 313*, the Court in the opinion rendered in that case say: "The charter of this corporation is, beyond a doubt, a contract, under the adjudged cases in this and other states, by which the corporation acquires the powers and functions to transact such business in the mode prescribed; but it is the opinion of a majority of the Court that all this is, by necessary implication, subject, as all citizens are, to the legislative power of the state to define, prohibit and punish extortion."

Many cases might be cited where charters to corporations, in the nature of contracts, allowing such corporations to fix rates and charges for service rendered to the public, have been held to be subject to subsequent legislative authority to control, regulate, adjust and reduce such rates.

G

1. It is stated, in the argument for plaintiff in error, on page 72, that "numerous cases may be cited in support of the proposition that the contract entered into, under the ordinance of June 6, 1882, is invalid, in so far as it attempts to bind the corporation as to the price of water beyond the term of the then members of the city council." The claim of defendant in error is enlarged beyond its contention, by this statement. The claim in fact is that the ordinance of June 6, 1882, is invalid in so far as it attempts to bind the corporation to the price for water service at fixed, unjust, unfair and unreasonable rates without reference to the duration of the term; and that, by numerous and respectable authority, ordinances and contracts fixing such rates are condemned.

2. It will serve no useful purpose here to collate and comment at length on these cases. For it is as obvious to the members of this Court, as to the legal profession, that these cases on this question are much in conflict, and many of them irreconcilable. But it is not conceded, as counsel for plaintiff in error contend in argument, that "these cases will show that the doctrine contended for by us is the correct one."

In the case of *Trustees vs City of Jacksonville*, 61

*Ill., (appl) 199*, the principle is recognized that a contract, by which a supply of water was to be furnished to appellant for a term of 10 years at a fixed price was held invalid, and that the city had power to change the rates for supplying water from time to time as circumstances might require or justify. The Court, in the opinion say: "If it can be bound by such contract as here set up, it may be bound by another much more difficult of performance, and so it may happen that by reason of improvident contracts, the city may be prevented from performing its duty properly to the great mass of its patrons."

In *Spring Valley Water Works vs Schottler, 110 U. S., 34*, the Court. in speaking in the opinion of a reserved power of alteration and repeal of statutes of the state in relation to charters of incorporated companies, say: "As a corporation, it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which grow out of contracts lawfully made, depend alone on the statute under which it was organized, and such alteration and amendment thereof as may from time to time be made by proper authority. The provisions for fixing rates cannot be separated from the remainder of the statue, *by calling it a contract.* It was a condition attached to the franchise, conferred on any corporation formed under the statute, and indissolubly connected with the reserved power of alteration and repeal." Again, "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full con-

sideration in *Munn vs Illinois, 94 U. S., 113.* As was said in that case, *such regulations do not deprive a person of his property without due process of law.*"

The validity of an ordinance, in the nature of a contract entered into by the city with a private corporation, for a supply of gas at a fixed price for the period of thirty years, was under consideration in the case of *E. St. Louis vs E. St. Louis L. G. Co., 98 Ill., 415,* an objection was made to the validity of the ordinance on the ground that it tied up the legislative powers of the city in providing for a supply of gas for a long term.

The Court in the majority opinion intimates that the contract providing for the fixing of rates for that period of time might be objectionable; but that in so far as the contract had been executed by the city, it was liable for gas which had been furnished under it at the contract price. The Court, in the opinion, say: "It is enough for the obviating of any such objection that there be the right at any time to avoid the contract, so that there may be the freedom to exercise its governmental power in regard to the subject, when and as the city pleases. So far as the contract has been performed, by furnishing light to the city, without its disaffirmance of the contract, it may be treated as if it had been a single contract for the furnishing of the light for the months in question alone, and one fully completed."

Justice Walker wrote a dissenting opinion in this case, holding the contract unconstitutional. In this opinion the powers of municipal corporations in such cases is discussed at length, with great learning and ability.

This ordinance, or contract, afterwards became the subject of much litigation, both in the Appellate and Supreme courts of the State of Illinois. The controversy finally ended with the case of *E. St. L. Co., for use of Griswold vs City of E. St. Louis, 47 Ill. (Appl.), 411.* The Court in the opinion in that case say: "The separate dissenting opinion of Justice Walker demonstrates, by a clear and conclusive reason, that as an executory contract, this contract of Oct. 4, 1874, is invalid and void, and, as we think, nothing said in the principal opinion contraverts such expression, but, on the contrary, it is there conceded that the city could at any time avoid this contract."

III

A

This ordinance of the city of Freeport, passed Feb. 10, 1896, is not in violation of the provisions of Sec. 10, Art. 1, of the Constitution of the United States, if the ordinance is within the scope of the police powers of the municipality, or, if in its passage, the corporation was exercising that inherent power of sovereignty, resting in all legislative bodies, to protect the welfare of the public against *injustice and oppression.*

In the case of *N. Y. & N. E. R. R. Co. vs Bristol, 151 U. S. 556,* Chief Justice Fuller states the rule to be, on this branch of the case at bar, as follows: "It is likewise thoroughly established in this Court, that the inhibition of the constitution of the United States, upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the law by the state, are not

violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. * * * The conclusions of this Court have been repeatedly announced, to the effect that railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression."

In the case of *Hawthorn vs the People, 109 Ill, on page 311*, the Court, in construing a statute, claimed to be in derogation of the common law and as not falling within the scope of the police power of the state, said: "It is claimed that this statute is not a police regulation. That may be true, if the term were confined merely to the protection of the *health and morals* of the people. The term has a much more comprehensive meaning. It has been defined to be: 'The regulation and government of a county or city, so far as it regards its inhabitants.' Also, 'The laws, ordinances and other measures which require the citizens to exercise their rights in a particular form.' It is true there are other and more limited meanings of the word, and when it is said that there are other limits to its exercise than the constitution, it has reference to the more restricted mean-

ing of the term. When exercised by the legislature, in its more comprehensive sense, in the passage of laws for the protection of life, liberty and property, or laws for the general welfare, the only limitation to restrain its action must be found in the constitution. This, in the larger sense, is an exercise of the police power by the General Assembly, and falls fully within legislative powers, and sustains the enactment under consideration."

It will undoubtedly be claimed that the powers above mentioned, in some of the cases cited, did not relate strictly to the police power now being considered. Police powers, as we have seen, have no precise limitation or restriction, but extend to all matters effecting the public welfare, and are called into use as the necessities of each particular case may arise.

2. It is insisted by counsel for plaintiff in error that the enforcement of said ordinance, by the city of Freeport, will deprive their client of his property without due process of law. To have this effect, in a legal sense, it must deprive it of some right or interest in property rights which the law should protect. This question, again, brings up for consideration the character of the plaintiff in error's business, with reference to its relation to a public use. As bearing upon that question, and what constitues the taking of property without due process of law, the case of *Budd vs People of New York, 143 U. S., 517*, has, among other cases, been cited in the brief of this argument.

The case was brought to this court on writ of error to the Court of Appeals of the state of New York. The

opinion of the court below will be found in the *22 N. E. Rep. 670.* The case in both courts received marked consideration, and the opinions rendered by those courts are exhaustive and instructive, and apply in a large extent to the questions involved in this case. While the case relates to the privileges and duties of private persons engaged in the business of conducting elevators, and other classes of business impressed with a public use, these opinions cover much that is in point here. The opinion given in the Court of Appeals holds: "The control which by common law, and by statute, is exercised over common carriers is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property does not in every case depend upon the question of legal monopoly. From the earliest period of the common law, it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforcible beyond the point of *reasonable compensation.*

* * * The underlying principle is, that business of certain kinds holds such a peculiar relation to the public interest, that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, *the existence of a virtual monopoly*, the benefit derived from the canal, creating the business and making it possible, the interest of trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice

of legislation in analagous cases. These circumstances collectively create an exceptional case and justify legislative regulation. * * * There is little reason under our system of government for placing a close and narrow interpretation on the police power, or in restricting its scope so as to hamper the legislative power in dealing with the very necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest." This opinion rendered in the Court of Appeals was affirmed by this Court in the case of *Budd vs New York, Supra.*

When the case was before this court, there was an attempt to overthrow the authority of the case of *Munn vs People.* That case, with others, cited in the opinion supporting it, were reviewed, and the principles of the case of Munn affirmed, and the act of the state of New York then under consideration sustained. The Court, in the opinion, say: "We are of the opinion that the Act of the legislature of New York is not contrary to the 14th amendment to the Constitution of the United States, and does not deprive the citizen of his property without due process of law; that the Act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shovelling to the actual cost thereof; and *that it is a proper exercise of the police power of the State.*"

That the ordinance of June 6, 1882, creates a monopoly cannot be successfully denied. It was intended to effect that pnrpose. It, so far as words go, makes the grant exclusive. The city of Freeport is obligated by it to pay for this hydrant rental, even

should it refuse the service, and if the ordinance be valid, to pay the price fixed by the ordinance for the 30 years term. It cannot purchase the works before the end of that term, and then if not in a situation to purchase, the monopoly is continued by this contract for a further term of 25 years.

If the exclusive privilege clause of the ordinance is invalid, it does not relieve the city from paying these rentals. The monopoly so created and protected is extortionate, *to the extent of more than one-half of the fixed price.* It is admitted by the record that the rates so fixed are *unfair, unjust, unreasonable and oppressive.*

3. It is claimed on the part of the plaintiff in error that the act of June 6, 1891, is invalid, for the further reason, that the act provides that the city council is made the tribunal to sit in its own case, in determining what are reasonable rates; and further, that establishing rates is a legislative and not a judicial act. But little space in this argument will be devoted to this contention. It is admitted all through the argument for plaintiff in error, that the power to fix rates *was delegated by the water works acts to the City Council to determine and fix rates by ordinance.* On the other point of the contention, it has been a usual mode adopted by the legislature to confer upon agents, appointed by its authority, to establish and fix reasonable rates and charges in the performance of a public service.

This question was under consideration in the case of *C. B. & Q. R. R. Co. vs Jones, 149 Ill., 361,* where many cases, decided in both the state and federal courts are cited and discussed, which furnish an exhaustive

brief against this contention of plaintiff in error. The Court in the opinion say: "When a board is authorized to make a schedule of rates, and the schedule is merely given the force and effect of *prima facie* evidence, as to the reasonableness of the rate, in a suit involving the question of such reasonableness, there is no delegation to the board of the legislative power to establish rates. The legislature thereby merely refrains from the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But, when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there; *then resort may be had to the courts to inquire judicially whether the charges are reasonable*" *(116 U. S., page 462)*."

Nor does the Act in question deprive the plaintiff in error of the right of trial by jury. In the case last above cited, it was contended that the statute then under consideration, in providing that commissioners should make a schedule of rates, which should be *prima facie* evidence of reasonableness, infringed upon the right of trial by jury. But the Court in the opinion say: "We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of

the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. (*2 Rice on Evidence, pages 606, 807; Commonwealth vs Williams, 6 Gray, 1; State vs Hurley, 54 Me. 562*). *Such provisions are not unusual.*"

In the case of *N. Y. & N. E. R. R. Co. vs Bristol 151 U. S. 556*, the Court, in speaking of the power of the legislature to delegate its authority to fix reasonable rates in such cases, say: "The state has power to exercise its control through Boards of Commissioners; there is no unjust discrimination, and no denial, of the equal protection of the law in regulations applicable to all railroad corporations alike, nor is there necessarily such denial, nor an infringement of the obligation of a contract in the imposition upon them, in particular instances, of the entire expense of the performance of the acts required in the public interests, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law by statute under which the result is ascertained in a mode *suited to the nature of the case and not merely arbitrary and capricious.*"

In the case of the *City of Danville vs Danville Water Co. 178 Ill. 299*, the Court in speaking of the the act of June 6, 1891, say: "We are of the opinion that the act was not an invalid and unconstitutional law, and that the legislature had the right to confer the power to fix maximum rates upon cities, in which private corporations had already been authorized to supply water, as well as cities which were to be so authorized

after the passage of the act. It follows, that the ordinance of Jan. 17, 1895, was a valid ordinance. It is to be remembered that the amount which the company seeks to recover in this suit, is for water furnished after the ordinance of Jan. 17. 1895, was passed, and after the company received notice provided for in that ordinance."

It will be observed that in the case at bar, the action is brought to recover for water rates furnished the city of Freeport since the passage of the ordinance, here in question, of Feb. 10, 1896; the city having paid for water so furnished, in full to that date, and is brought, after notice to the company, that only reasonable rates for the supply thereafter would be paid.

4. Regulations of trade may more or less impair the value of property, but unless they virtually take away and destroy those rights in which property consists, they do not come within any constitutional inhibition. Besides, such destruction, for all substantial purposes, must be total. This rule was declared in the case of *Munn vs People, 69 Ill., on page 89.*

The court in the opinion rendered in that case, further say: "No person can claim that, in the exercise of the proper function of government, his property shall not be diminished in value. The point is, the owner shall not be deprived of his property without due process of law. If, in the exercise of any one of the admitted functions of government, a person's property is rendered less valuable, can it be seriously claimed this provision in the Bill of Rights has been infringed?" In the case at bar, the position of defendant in error is aptly stated in this opinion: "By the law under consideration

no right of property is taken away or destroyed. All the property the owners ever possessed in this business remains to them untouched by the strong hand of legislative power."

The only ground upon which plaintiff in error rests its claim that its property, by this statute and ordinance, is to be taken or damaged without due process of law is, that its profit and income will thereby be diminished. In the Munn case, the same point was urged, by counsel, upon the attention of the Court. In passing upon this claim the Court say: "*Anticipated profits* are not and cannot be held and regulated as property in the ownership or possession of him who owns the article out of which profits are expected to flow. The property is one thing and remains untouched—the profits are not *in esse* and cannot be claimed as property. When it is said one is deprived of his property, the understanding is, it has been taken away from him—he is divested of title and possession. This provision in the bill of rights has never been so construed by the courts of any state, whose constitution has such a provision, as to deny to the legislature the power to make all needful rules and regulations respecting the use and enjoyment of property."

B

The irrevocable grant of special privileges to persons or corporations by section 14, article 2, of the constitution of the state of Illinois, of 1870, is a denial of the power to municipalities to fix unalterable rates and charges for furnishing water to such municipalities.

The plaintiff in error, here, is claiming an *exclusive and special privilege*, to furnish water to the city of

Freeport and its inhabitants, by an irrevocable contract, at fixed rates and time for water service. Under this contract it is insisted that while the *exclusive provision* thereof may not be maintainable, yet, that the contract is invoilable in its other provisions, the effect of which are, to bind the city from contracting with any other person or corporation for supplying water, and to charge the rates for hydrant service mentioned in the contract for the period of thirty years.

C

The contract is further avoidable, as to the rates to be paid for water service for that length of time, and by Sec. 1, Art. 10, Chap. 24, of the revised statutes not enforceable, for reasons which have hereinbefore been stated.

This contract is further subject, as to future service for water supplied the city, to the ordinance of February 10, 1896, enacted in pursuance of the act of June 6, 1891. It is claimed, however, by plaintiff in error that this act is invalid because the legislature could not rightfully enact the law so as to affect any right or interest of plaintiff in error secured by the said so-called contract. This contention, in some measure, depends upon the construction of Sec. 9, Chap. 32, of the statute of the state of Illinois relating to corporations. That section of the statute was under consideration and fully discussed in the late water works cases decided by the Supreme Court of that state.

In the *Danville case*, *Supra*, the Court say: "The Danville Water Company was organized under the general Incorporation act of this state, approved April 18,

1872, in force July 1, 1872. The charter of a corporation, formed under the general Incorporation act, does not consist of its articles of association alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of the charter (*People ex rel vs Chicago Gas Trust Co. 130 Ills. 268.*) Therefore, the provisions of the general Incorporation act must be regarded as entering into, and forming a part of, the charter of the defendant in error. Section 9 of the general Incorporation act provides that: 'The General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act.' (*1 Starr & Curt. Ann. Sta.—2d ed.—p. 1006*).

By organizing under the general Incorporation act, the defendant in error agreed to submit itself to and to be bound by such regulations and provisions as the legislature should deem it advisable to make. The object of its creation was to furnish water to the city of Danville and the inhabitants thereof. The right of the legislature to regulate and provide for the rates, at which such water should be supplied, *was a right reserved by section 9.* The language of section 9 is different from, *and broader in its scope than*, the language contained in many charters, which reserve to the state the power to repeal, alter, amend or modify the charter itself. We apprehend, therefore, that the decisions restricting the power of the state as to charters which are given subject to the right of the

state to repeal, alter, amend or modify them do not apply to *such broad language as is used in section 9.* By the terms of section 9 it is something more than the mere right to change the charter of the corporation, which is reserved to the legislature. The authority is thereby reserved to provide the regulations and provisions, under which the corporation may proceed in the transaction of its business. We have held that the legislature may impose duties on corporations the same as on individuals in the absence of special enactments. We have also held, that the constitution of 1848 by implication reserved to the legislature the right to change or increase the liability of a shareholder in a corporation. *(Illinois Central Railroad Co. vs City of Bloomington, 76 Ill., 447; Weidenger vs Spruance, 101 id., 278; Diversey vs Smith, 103 id., 378; Arenz vs Weir, 89 id.. 25; Buttler vs Walker, 80 id., 345.)*."

A lengthy quotation has been made from this opinion, because it presents the question in a more concise statement than any argument made could present it. In the Danville case, the city by an ordinance had contracted to pay $75.00 as the annual fixed rent for hydants, to the water corporation for the term of 30 years. By mutual concession these rentals had been reduced so that at the time of the commencement of the action, rental charges had been reduced from $40.00 to $50.00 per hydrant per annum.

The opinion in that case also discusses and determines against the contention of plaintiff in error, that the provisions of said statute of 1872, were broader in its scope than similar statutes of other states restricting legislative control over corporations organized under

general laws. Thus several pages of the argument for plaintiff in error is replied to by making said quotation.

2. When a legislature delegates powers to a municipal corporation as a tribunal, as an agent of the law, such tribunal or agent can establish only *reasonable* rates. It is stated in the first special plea of the defendant in error, and admitted by the demurrer, that the rates, when and as fixed and established by the ordinance of June 6, 1882, were unjust, unfair and unreasonable.

If so, the city of Freeport as we have seen, if the contention of the plaintiff in error is correct, would be required under this ordinance to pay these unreasonable rates for a water supply, according to the price and for the term fixed in this ordinance. It is here contended, however, that by the notice given to the plaintiff in error by the city council, and by the provisions of the ordinance of Feb. 10, 1896, such unreasonable rates were suspended, and that the rates fixed in the latter ordinance, which are by the demurrer admitted to be just and reasonable, are substituted therefor, and that the defendant in error's liability for water supply thereafter is governed by the amended ordinance.

The legislature of the State of Illinois, by the act of June 6, 1891, has provided that, "in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same same be reviewed and determined by the Circuit Court of the county in which such city, town or village may be."

In the case of *Rogers Park Water Co. vs Fergus, 178 Ill. 571*, it was contended there, as it is here, that

this tribunal, to determine what were reasonable rates and charges, is not a lawful tribunal to act in such case. The Court in the opinion, however, say: "Nor are the corporations left without remedy against unwarranted and unjustifiable acts of the municipal council. If the scale of rates established by a city council is deemed by the corporation to be unreasonably low and unjust, it is expressly provided the action of the council may be reviewed and determined by the Court, on application of the corporation."

In the case of *San Diego Water Co. vs City of San Diego, 50 Pafc. Rep. 633*, the city council of that city, under authority of the legislature, proceeded to fix water rates for a supply of water to the city, and it was claimed that such rates, fixed by an ordinance of the city council under that authority, were unreasonable. The Court in the opinion sustain the validity of such legislative authority to empower the city council to act thereunder and hold, "if the city council has fixed rates so palpably unreasonable and unjust as to amount to a taking of plaintiff's property without just compensation, it has so far exceeded the powers conferred upon it, and the Court is competent to afford redress."

It was there contended that the city council, having acted without notice of its intention to change such water rates, and the corporation not having appeared to act in the fixing of such rates, the action of the council was invalid, although the ordinance did not provide that the corporation should have notice. The Court seems to have given some weight to this contention, although the case was not determined upon that point.

Here, however, the special pleas of the defendant in error set up that the plaintiff in error *was notified*, and that efforts were made to *induce it to meet and confer with the city council*, with a view of fixing and adjusting such reasonable rates, but that the water company refused such offer. That, thereupon, the city council itself proceeded to fix, determine and ordain such reasonable rates, and that the rates so fixed by the said ordinance are *just, fair and reasonable.*

Yet, if the plaintiff in error now considers the rates so fixed by the city council unfair and unreasonable, it may apply to the court for a hearing upon that question, and in such case, a jury is allowable, there is no denial in the act of the right of trial by jury.

IV

No attempt will be made here to go through the brief and argument made for the plaintiff in error, to analyze the numerous cases there cited, or to show their application or irrelevancy to the questions involved in this case. It will not be claimed, on the part of the defendant in error, that all the cases cited to support its contentions made in this brief, in their facts, or conclusion, are an exact parallel of the case at bar.

An examination of the brief for plaintiff in error reveals the fact that many of the cases therein cited have no, or but little, relevancy to the issues in controversy here. A few of the cases, to which much prominence is given by counsel for plaintiff in error, will be briefly noticed.

The main proposition relied upon to sustain the case of the plaintiff in error is, that the contract claim-

ed by the ordinance of June 6, 1882, authorizes and legitimatizes the right of the water company to continue the rates and charges for water service therein fixed for the full period of 30 years. Further, if it does not, then under an implied power arising from the statute in question, the power is conferred, and the ordinance or contract is thus made valid.

These contentions, if untenable, are fatal to the claim of the plaintiff in error. To the contention of the defendant in error, that, even though the contract be authorized in either of the modes above stated, the contract is obnoxious, as an invasion of the police power, it is replied that the act of Feb. 10, 1896, was not passed, nor can it be sustained, under what is termed a reserved police power. It is stated in the brief, "that this question is no longer an open one in this court."

To sustain this positive assertion is cited the case of *Walla Walla vs Walla Walla Water Co. 172 U. S.* which is mainly relied upon. To understand the force and binding character of a judicial decision, it is of the first importance to learn what facts and what legal principles were involved in the case. It seems that the issue made in that case, and raised upon the *answer* of the defendants was: "That the contract of the city with the plaintiff was not a valid and binding contract, so far as concerned the stipulation binding the city not to erect or maintain, or become interested in, any system of water works other than that of the plaintiff."

The Court in the opinion say: "As the contract in question was expressly limited to 25 years, and as no attempt was made to *grant an exclusive privilege* to the

water company, the city seems to have acted within the strictest limitation of the charter. *Atlantic City Water Works vs Atlantic City, 48 N. J. Law, 378; had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect.*"

The Court again say: "There was no attempt made to create a monopoly, by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own, was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the water works of the company at any time during the existence of the contract. Taking sections 7 and 8 together they amount simply to this; that, if the city should desire to establish water works of its own, it could do so by condemning the property of the company, and making such changes in its plant, or such additions thereto, as it might deem desirable for the better supply of its inhabitants, but that it would not enter into a direct competition with the company during the life of the contract."

It is true that the Court, in the opinion, held that the contract there under consideration was valid, and what was said in reference to the police power must be considered as applying to the case then under consideration. But it will be seen that the case in its important and controlling features, is not analagous to the case at bar. For here, *the exclusive privileges* of the contract *tend to create a monopoly* by tying up the hands of the city by an exclusive contract, as to price and duration

of the term for 30 years, with no authority given to the city to erect water works for itself, to purchase the plant, or to authorize any other person or corporation to supply the city with water covering that period.

The case of *Los Angeles vs Los Angeles City Water Company, 177 U. S., 558*, has very little if any bearing upon the questions involved in the case at bar. The ordinance therein questioned was passed in pursuance of the provisions of the constitution of the state of California, adopted in 1879, in relation to "water and water rights," which provided in substance, section 1, that the rates or compensation for the use of water supplied to any city, county or town, or the inhabitants thereof, should be *fixed annually* by the board of supervisors or the municipal authorities, in the same manner as other ordinances and resolutions are passed, and should *continue in force one year and no longer.* That in pursuance of said constitutional provision, the electors of the city of Los Angeles ratified and adopted a charter, and the ordinance there under consideration was passed pursuant to the foregoing *constitutional and statutory provisions.* Afterwards, on October 19, 1896, the city of Los Angeles adopted a resolution, requiring the water company to pay to the city an amount of money equal to 40 per cent of the gross rates received by said company from the consumer of water, as rental for all water taken by said company from the Los Angeles river during a certain period of time.

It further appears from the statement of the case that the city had leased to certain parties the water works in question, which had been constructed by the city, for a term of 30 years, with the right to lay pipes

in the streets, and sell and distribute the water for domestic purposes, as also the right to take water from the Los Angeles river to a limited amount. This lease was assigned to the water company, which was organized for the purpose of supplying the city of Los Angeles with water under its provision. It further appears that in the year 1870 the legislature, by an act then passed, ratified all of the acts, ordinances and agreements so made in reference to the furnishing of water. The Court, in the opinion, reviewed all of these acts, ordinances and contracts, and summed up a conclusion thereon, as follows: "We are not concerned, however, to reconcile the cases decided since 1870, and we have only mentioned them to present fully the contention of appellant. The cases prior to that time, as we have seen, made the obligation of the contract of 1868, and determined the power of the legislature to ratify it. And there seems to have been no question of this power. Besides, *legislative recognition*, *besides recognition by many acts of the city*, the contract has received judicial recognition."

It is needless to say that there is nothing shown there in common with the case at bar. There was no question of the right to fix unalterable rates and charges, for long period of time, in fact the law made it obligatory upon the authorities to fix annual rates for water service. Nor are there any exclusive privileges secured to the water company, like unto those contained in the contract under consideration, in the case at bar.

The New Orleans cases are frequently cited as, supposedly, sustaining the contention of counsel for plaintiff in error, in their definition of the term "police pow-

er." From an examination of those cases it will be seen that the questions involved, in those cases, was whether or not the legislature of the State of Louisiana could grant exclusive privileges to cities or villages for providing a supply of gas or water for public use. It was held by the Court, in those cases, that such grants under the constitution and laws of that state were binding. None of those cases touch upon the question here involved, but related entirely to the time limit, of making a contract for *an exclusive privilege*, for supplying water. The question of rates does not seem to have been involved.

The Court in the case of *New Orleans Water Co. vs Rivers, 115 U. S. 674*, cite from the opinion in the case of *New Orleans Gas Light Co. vs Lou. L. Co. 115 U. S. 650*, as follows: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect *the public health*, the *public morals or public safety*, as the one or the other may be involved in the execution of such contract. Rights and privileges arising from contracts with a state are subject to regulation for the protection of the public health, the public morals and the public safety in the same sense as are all contracts, and all property, whether owned by natural persons or corporations."

The case of *St. Tammany Water Co. vs New Orleans W. Co. 120 U. S. 63*, is but an affirmance of the law of the Rivers case, *Supra*. These cases practically decide that where an express, or exclusive grant is made to an individual or corporation, for the exercise of a business of a purely private nature, it is valid. They do not decide

that when such business is of a *public character* relating to the welfare of the community, or *is impressed with a public service*, invoking the application of those natural laws, which from time to time operate upon and affect the cost of supply, and the price thereof, that such grants are valid. It must also be remembered that those cases refer to, and support, the grant of *an exclusive privilege as to the duratisn of the time of maintaining water works, but not as to fixed rates for that length of time for the service.*

The water works cases decided by the Supreme Court of the state of Illinois, and now pending in this Court, and which are, by the orders made in these cases, to be considered together by this Court, will doubtless receive due consideration. It is believed that these cases cover all of the questious material to a proper determination thereof, and are founded upon principle and authority. Counsel for plaintiff in error refer approvingly to the dissenting opinion of Justice Phillips, in the Danville case. It will be noticed that the Freeport case, the one now under consideration, was decided and the opinion of the court below affirmed by a unanimous Court.

The cases cited in the dissenting opinion by Justice Phillips, as will be seen from their examination, relate to *exclusive rights and privileges*, but in no one of these cases is found the vital questions involved here—the fixing of unalterable rates for an unreasonable length of time.

The act of June 6, 1891, is not invalid by reason of any repugnancy to the constitutional provision relating to the impairment of contracts. *Douglas vs State*

*of Kentucky, 168 U. S., 488; Ford vs Chicago Milk Shippers' Assn., 155 Ill, 166; Munn vs People, 69 Ill., 80; Cooley, Const. Lim. 436.*

V

There are some inaccuracies made in the statements of counsel for plaintiff in error in their argument to which the attention of the Court will be briefly called. The fourteenth amendment to the constitution of the United States has *not* enlarged the meaning of the term "due process of law," beyond the provision as found in the original constitution on that subject. *Cooley on Const. Lim.,437-438; Howes vs Grush, 131 Mass., 207.*

On page 70 of the argument of plaintiff in error, it is stated that the legislature of the state of Illinois, by two special acts, "have especially empowered cities and villages to make a contract for water at fixed rates by ordinance, and for a period of 30 years." This is an inadvertant statement, doubtless, of a fact not justified by an investigation of the statutes.

It is stated by counsel for plaintiff in error, in their argument, page 75, that "there is no allegation in the plea that the plaintiff in error knew, when it accepted its ordinance, that the rates were unreasonable." It is, however, stated in the pleas that they were in fact unreasonable, and so remained, up and until the passage of the ordinance of Feb, 10, 1896, and that, prior to the passage of such ordinance, the water company was informed that such rates were unreasonable and were invited to act with the city council to adjust reasonable rates, but that the water company declined so to

do. Nor can it be successfully urged that because the corporation has submitted to the payment of such unreasonable rates for a number of years, that they are estopped from now questioning their unreasonableness. If the contract was invalid in its inception, for want of authority in the city council to execute it, acquiescence will not estop the city from now urging the want of power to make it. This question has been repeatedly determined against the contention of the plaintiff in error, notably in the case of *E. St. Louis vs E. St. Louis G. L. Co. 98 Ill. 415*, and other cases predicated thereon.

It is true that, by the assignment by Shelton of the contract, there was conferred upon the assignee all rights under it which the assignor might exercise. But the company's assignee would not have more enlarged right than the assignor. This water company was organized to supply water to the city of Freeport under this contract. It will be charged with notice of all want of power in the city council to authorize it, and as a corporation, in the exercise and carrying out of its provisions, will be subject to the same legislative restrictions as are imposed upon other corporations organized under the general law of the state.

VI

It is further submitted, that by the decisions in the water works cases in the Supreme Court of the State of Illinois the act of June 6, 1891, is held to be constitutional; that it is not objectionable to any constitutional provisions of the United States, or of the State of Illinois; that the ordinance of June 6, 1882, was invalid

in certain particulars; that the city had no power to make a contract to pay fixed and unalterable rates for 30 years, and that the language of the water-works act of April 10, 1872, does not necessarily imply the power to make a fixed rate. That while the supply could be contracted for for the entire term, the price should be determined from time to time and rates be settled by the rules of the common law.

It is further here insisted, that the contract, as made, is an infringement upon the rights of sovereignty, which, by the common law, is invested in all legislative bodies in dealing with public rights and privileges, and that the contract is an invasion of the police powers vested in municipalities, so far as it attempts to fix unalerable rates, and is therefore invalid.

In the case of *N. Y. & N. E. R. R. Co. vs Bristol, on page 412*, in speaking of the laws and regulations applicable to corporations when exercising police powers, and the adjudication of the State Courts regarding them, the Court say: "That the adjudication of the highest Court of a state, that, in such particular, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this Court on the ground of an infraction of the constitution of the United States. *Railway Co. vs Alabama, 128 U. S., 96; 9 Sup. Ct., 28; Banking Co. vs Smith, 128 U. S., 174; 9 Sup. Ct. 47; Railway Co. vs Beckwith, 129 U. S., 26; 9 Sup. Ct., 207; Dent vs West Virginia, 129 U. S. 114, 9 Sup. Ct. 231; Railroad Co. vs Gibbes, 142 U. S. 386, 12 Sup. Ct. 255; Railroad Co. vs Emmons, 149 U. S. 364, 13 Sup. Ct. 870.*"

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The time for the preparation of the argument for the defendant in error has been limited. In the time allotted it has been found impossible to go through and thoroughly digest the almost numberless cases cited and referred to in the brief and argument for plaintiff in error, nor to, in detail, make reference to the many points urged therein. But it is believed that the material and controlling facts in this case have been mentioned and considered, and that in this presentation of them the Court may find reason to approve and sustain the positions so taken, and affirm the judgment of the Supreme Court of the state of Illinois.

A. J. HOPKINS,

*Attorney for Defendant in Error.*

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# Supreme Court of the United States.

No. 348.—October Term, 1900.

The Freeport Water Company, Plaintiff in Error, vs. The City of Freeport. } In error to the Supreme Court of the State of Illinois.

[March 25, 1901.]

This is an action of assumpsit brought by the plaintiff in error against the defendant in error in the circuit court of Stephenson County, State of Illinois, for the price of water delivered by plaintiff in error to defendant in error between January 1, 1896, and July 1, 1896.

The cause of action was based upon a contract arising from an ordinance passed by defendant empowering the plaintiff to construct certain waterworks in the city of Freeport and the renting from the plaintiff by the city of certain fire hydrants.

To the defenses of a subsequent ordinance reducing the rental of such hydrants, it was replied that the latter ordinance impaired the obligation of the first ordinance as a contract, and therefore violated the Constitution of the United States.

The case was presented upon a demurrer to the pleas of the defendant. The demurrer was overruled by the circuit court, and the plaintiff electing to stand by its demurrer, judgment was entered for the defendant for costs. On appeal to the Supreme Court the judgment was affirmed, (186 Ill. 179,) and to that action this writ of error is directed.

The facts presented by the pleadings are as follows:

The plaintiff is a corporation organized and existing under the general laws of the State, and the defendant is a municipal corporation organized under the general act of the State, entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, and in force July 1, 1872, and the acts amendatory thereof.

That on the 6th of June, 1882, defendant enacted an ordinance giving and granting to Nathan Shelton or his assigns the exclusive right and privilege, for the term of thirty years from the 1st of July, 1882, to supply the city of Freeport and its citizens with water suitable for domestic and manufacturing purposes. The city reserved the right of purchasing the works at the end of thirty years. If such right should not be exercised the rights and privileges of the plaintiff were to be extended for a further period of twenty-five years. There were the usual provisions for the use of the streets, the character of the works and appliances, the quality of the

water, and provision was made for the extension of the system as the growth of the city and its needs might require.

Section 7 of the ordinance was as follows:

"The said Nathan Shelton or his assigns shall erect double-nozzle fire hydrants upon all mains ordered laid by said city council in said city at the rate of not less than ten to each mile of said mains, and shall erect said fire hydrants whenever and wherever said city council shall direct. And said city shall pay to said Nathan Shelton or his assigns as an annual rental for the first one hundred of said hydrants the sum of one hundred dollars each, for all said hydrants over one hundred and up to one hundred and fifty an annual rental of eighty dollars each, and for all of said hydrants over one hundred and fifty an annual rental of fifty dollars each, which said rentals shall be payable semi-annually on the fifteenth days of January and July in each year, and the pay of each hydrant shall commence when each hydrant is actually ready for use and the city officially notified thereof, and shall continue during the full term specified in this ordinance, unless said city shall sooner become the owner of said waterworks as hereinbefore provided, in which event said rental shall cease. The pay of any hydrant shall cease whenever any hydrant is out of repair or unfit for use or incapable of throwing a stream as provided for in this ordinance."

The city was given the right to use water free of charge from the hydrants on streets curbed and guttered for flushing and washing the gutters, and from any hydrant, upon giving notice, for flushing any and all sewers; also water free of charge for the use of the fire department and for the city hall, public offices, public schools, churches and for four public drinking fountains if the city should erect the same.

Maximum rates to consumers were fixed for purposes which were especially enumerated, and it was provided that "rents for other purposes not herein named will be fixed by meter measurement, as may be agreed upon between the consumer and the water company, not exceeding the following rates." The rates were specified.

Section 13 was as follows:

"This ordinance shall become binding as a contract between the city of Freeport, Illinois, and Nathan Shelton or his assigns, upon the filing with the city clerk of a written acceptance thereof by Nathan Shelton or his assigns, provided the same shall be done within thirty days from the passage and publication of this ordinance, and this ordinance when so accepted shall not be altered, amended or changed in any way without the concurrence and consent of both parties thereto and interested therein, or their successors or assigns."

On June 27, 1882, Shelton filed a written acceptance of the terms and conditions of the ordinance. On August 8, 1882, he assigned all his rights to plaintiff, of which defendant had notice. Plaintiff has complied with all things required of Shelton or of it, has constructed 121 hydrants as required by section 7 and as ordered by defendant, which were in operation on January 1, 1896, and defendant paid all rentals which became due

January 1, 1896, and that there was due for rentals subsequent to that date, and up to the 15th of July, 1896, the sum of $5,840.

The pleas of the defendant in substance alleged that it was a municipal corporation organized under the general laws of the State for the incorporation of cities and villages, and that in pursuance of the statutes of the State relating to waterworks passed the ordinance of June 6, 1882.

It was alleged in plea No. 1 that the water rates fixed by such ordinance "were then unjust, unreasonable and oppressive to the citizens and taxpayers of said city, and so remained and continued to be unjust, unreasonable and oppressive from said enactment thereof up and until the subsequent action of the council of said city had in relation thereto. . . ." This charge was substantially repeated in the other pleas, and it was alleged that the new rates were just and reasonable. The ordinance of February 11, 1896, was set out in full. The following is all that is necessary to be quoted:

"SEC. 1. That the Freeport Water Company, a corporation, now furnishing to the city of Freeport and its inhabitants water for fire protection, domestic uses and manufacturing purposes, and other uses and purposes, shall be entitled to charge and receive therefor, and for the use of water meters, the rates and prices hereinafter fixed and no more.

*Fire Protection and Public Uses.*

"SEC. 2. Said corporation shall be entitled to charge and receive from the city of Freeport for all water furnished for fire protection and other public uses and purposes as hereinafter defined and enumerated an annual rental or rate of fifty dollars ($50.00) for each double-nozzle fire hydrant now in use in the said city of Freeport, or any that may be ordered hereafter by the city council of the city of Freeport, such rental to be payable in semi-annual instalments on the fifteenth (15th) day of January and July, provided that it shall be shown by a certificate signed by the committee on water, city engineer and chief of fire department that test of the works of said corporation has been made within six (6) months, and that such works have been in such condition as to furnish at all times and for any length of time a fire pressure sufficient to throw six (6) fire streams from six (6) hydrants chosen by the committee on water, each through fifty (50) feet of two and one-half inch hose and one-inch nozzle from each hydrant so chosen to a height of one hundred (100) feet, or maintain its equivalent in pressure at the nozzles of the hydrants. Where the works of said corporation are not shown to be maintained in condition to furnish such fire pressure the rental shall be one-half the amount hereinbefore fixed. The above rate and rental shall be in full payment for all water, furnished as follows: For fire protection including the furnishing and setting of fire hydrants for all water used by the fire department in extinguishing fires and in practice, for all water used by the committee on water for cleaning, washing, flushing gutters and sewers, in said city, and for all water used for the city hall, fire and police stations, and other city offices, for drinking fountain in park when desired, and for all public schools and churches in the city."

The ordinance further established in detail maximum rates for water to be furnished for domestic and manufacturing uses and other uses when furnished without meter; also rates when furnished or measured by meter. There was a penalty provided for charging greater rates than those established.

The ordinance was to take effect from the date of its passage, and the right of further regulation was reserved.

The rates established by the ordinance of February 11, 1896, were considerably less than those established by the ordinance of June, 1882.

The assignment of error presented the contentions in various ways that the ordinance of February 11, 1896, and the statutes in pursuance of which it was claimed to have been passed, violated the Constitution of the United States, in that the ordinance and statutes impaired the obligation of the contract made by the ordinances of June, 1882, with plaintiff, and deprived it of its property without due process of law.

The statutes of the State which are urged as applicable to the contentions of the parties are cited in the margin.*

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

The Supreme Court of the State based its decision on its opinions in the case of the *City of Danville* v. *Danville Water Co.*, (178 Ill. 299, and 180 Id. 235.) In that case the same statutes were involved as in the case at bar, and the contract which was claimed was based upon a substantially similar ordinance to that involved in the pending controversy.

It is not clear from the opinion of the court whether it intended to decide that municipal corporations could not be invested with the power to bind themselves by an irrevocable contract not to regulate water rates. If so, we cannot concur in that view. We have decided to the contrary many times, and very lately in *Los Angeles* v. *Los Angeles City Water Co.*, (1900) 177 U. S. 558. See also *Walla Walla* v. *Walla Walla Water Co.*, (172 U. S. 7,) where the subject is more extensively discussed and the cases reviewed. See also *New Orleans Water Works Co.* v. *Rivers*, (115 U. S. 115.)

We do not mean to say that if it was the declared policy of the State that the power of alienation of a governmental function did not exist, a subsequently asserted contract would not be controlled by such policy. In

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* An act to enable cities and villages to contract for a supply of water for public use, and to levy and collect the tax to pay for water so supplied. (Approved April 9, 1872, in force July 1, 1872.)

Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of

*Stevens* v. *School Directors*, (87 Ill. 225,) and in *Davis* v. *School Directors*, (92 Id. 298,) it was held that a school board could not make a contract for the employment of teachers to extend beyond the current year and this was put upon the ground of the inability of one board to control the exercise of the functions of its successor. In *East St. Louis* v. *East St. Louis G. L. & C. Co.*, (98 Ill. 415,) decided in May, 1881, the doctrine of those cases was not adopted as applicable to a contract for gas rates, nor was it rejected. One Justice asserted it with great emphasis, quoting those cases. The court, however, left it disputable, placing the decision on other grounds. There was at least admonition in those cases to persons entering into contracts with municipalities. If there was anything more, we need not decide, as there are other grounds for judgment.

The Supreme Court did decide in the Freeport case (1) that the water company having been incorporated under the general incorporation act of the State, approved April 18, 1872, the provisions of the act entered into and formed a part of its charter, and that by section 9 of the act (inserted in the margin,*) the right of the legislature to regulate and provide for the rates, at which the company should supply water to the city, was reserved; and (2) that the language of the act of April 9, 1872, and in force July 1, 1872, (inserted in the margin,*) did "not necessarily imply the power to make and fix rates." The court further said in 178 Ill. at page 309: "The authority 'to contract for a supply of water for public use for a period not exceeding thirty years' does not necessarily imply that the price of the supply should be fixed for the entire period. The supply could be made for the entire term, but the price is to be determined from time to time,

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water for public use, for a period not exceeding thirty years. (Public Laws of Illinois of 1871, p. 271.)

AN ACT to provide for the incorporation of cities and villages. (Approved April 10, 1872, in force July 1, 1872.)

SEC. 1. The city council or board of trustees shall have power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or water works. (Public Laws of Illinois of 1871, p. 259; 1 Starr & Curtis' Stat. p. 785, § 175.)

AN ACT to enable cities, towns and villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof. (Approved June 6, 1891; in force July 1, 1891.)

SEC. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That the corporate authorities of the city, town or village, now or hereafter incorporated under any general or special law of this State in which

and the rates to be settled by the rules of the common law. (*City of Carlyle* v. *Carlyle Water, Light & Power Co.*, 52 Ill. App. 577.)"

It is true that we do not necessarily have to follow this decision. When section 10, article 1, is invoked we decide for ourselves the fact of contract—not only its formal execution but its legal basis in law, and therefore construe for ourselves the statutes of the State upon which it is claimed to rest. In such case, we have also said, we are disposed to incline to agreement with the State court. These principles hardly need the citation of cases. They have become elementary. We may quote, however, the language of Mr. Justice Bradley in *Burgess* v. *Seligman*, (107 U. S. 20). After stating the peculiarity of the existence of two co-ordinate jurisdictions in the same territory and the necessity for the exercise of mutual respect and deference to avoid anomalous and inconvenient results, and yet asserting the necessity in the Federal courts of the right to exercise an independent judgment, the learned Justice said:

"Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal courts properly claim the

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any individual, company or corporation has been or hereafter may be authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the Circuit Court of the county in which such city, town or village may be. (Public Laws of Illinois of 1891, p. 85; 1 Starr & Curtis' Stat. p. 868, ¶ 458.)

Section 9 of the General Incorporation Act cited in the opinion is as follows:

The general assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: *And provided further*, That this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation. (Section 9, Corporation Act; Starr & Curtis' Stat. p. 1006.)

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right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such case, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts."

Applying these principles to the case at bar, we solve its questions. The Supreme Court of the State in passing on the case not only considered the acts of the 9th and 10th of April, 1872, regarding municipalities, but also, as we have said, the general incorporation act of April 18, 1872. Under the latter the plaintiff was incorporated, and it was held that the act "must be regarded as entering into and forming part of the charter" of the plaintiff. The statute reserves to the general assembly the power to prescribe in the government of corporations "such regulations and provisions as it may deem advisable." The language is very comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it. The Supreme Court of the State has construed it to be of greater import than the usual reservation of the power to alter and amend the charters of corporations.

The plaintiff, however, contends that it was not intended by the terms, "regulations and provisions," "to interfere with the internal business management of the corporation itself," but regulate "those classes of acts which control the relation existing between stockholders as individuals and the corporation as an entirety, and the relations between corporations and third persons; that is, the manner of carrying on their business or exercising the powers of a corporation." We think the construction is too narrow. The statute made no distinction between the internal and the external business of corporations—between their relations to stockholders and their relations to third persons. Such are but special exertions of the power which the legislature possesses.

In *Beer Co.* v. *Massachusetts*, (97 U. S. 25,) a provision was passed on of an act defining the general powers and duties of manufacturing corporations as affecting the beer company. The general statute was enacted in 1809, and the provision construed was as follows: "*Provided always*, that the legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient." The beer company was incorporated in 1828 "for the purpose of manufacturing malt liquors in all their varieties." It was held that the pro-

visions of 1809 were adopted in the charter of the beer company, and were a part of the contract between the State and the company, rendering the latter subject to the exercise of that power; and the seizure and forfeiture of certain malt liquors, which were intended to be sold in violation of the prohibitory liquor law passed in 1869, were sustained.

But assuming that section 9 of the general incorporation act is correctly interpreted by plaintiff, we are brought to the question of the power of the city to make an irrevocable contract for thirty years, fixing water rates. The power is claimed under the statutes of 1872, heretofore quoted. The Supreme Court of the State, as we have seen, decided against the claim, and the principle of *Burgess* v. *Seligman* applies if the ruling of the court and the contention of the plaintiff is "balanced with doubt." There were no previous interpretations of the statutes by the State courts upon which the plaintiff had a right to rely. It acted upon the faith of the statute alone, and committed its rights to a judicial interpretation of the statute. The rule which governs interpretation in such cases has often been declared. We expressed it, following many prior decisions, in *Detroit Citizens' Ry. Co.* v. *Detroit Ry. Co.*, (171 U. S. 48,) to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them.

In *Smith* v. *McDowell*, (148 Ill. 51,) the Supreme Court of the State expressed the rule as follows: "Their power [the power of municipal corporations] is measured by the legislative grant, and they can exercise such powers only as are expressly granted, or are necessarily implied from the powers expressly conferred."

The Supreme Court of the State applied these principles. It held that an irrevocable contract for specific rates was not indispensable to the other powers with which the cities of the State were invested. And a distinction was made between a contract which related to a governmental function, which the regulation of rates was said to be, and a contract which related to franchises which, though public in their nature, yet were not governmental, which the supply of water was said to be. This distinction, it was held, the statutes of 1872 observed, and gave the power to make one kind of contract but not the other—the power to contract for a supply of water, but not the power to contract "to pay a fixed and unalterable rate for thirty years." This was deduced from the silence of the statute of the 9th of April and the necessity of resolving all ambiguities in favor of the public. But ambiguity disappears, it was said, when the statute of the 9th was considered with the statute of the 10th, as it necessarily had to be, as the statutes were "*in pari materia*, and should be construed together." Section one of the act of the 10th of April "authorizes," the court said, "the

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city council to empower a private corporation to construct and maintain waterworks at such rates *as may be fixed by ordinance.* The meaning of this language is not that the waterworks are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause, 'for a period not exceeding thirty years,' qualifies the words 'construct and maintain the same,' but does not qualify the words 'at such rates as may be fixed by ordinance.'"

The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases. We said in the *Railroad Commission cases,* (116 U. S. 307,) by Chief Justice Waite, of the power of the regulation of rates:

"This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in *Providence Bank* v. *Billings,* (4 Pet. 514, 561,) 'its abandonment ought not to be presumed in a case which the deliberate purpose of the State to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous."

These remarks are obviously applicable to the Illinois statutes. The question is whether the power given to the municipalities of the State was to be continuing or occasional, indeed only special in its purpose, intended to have but one exercise and then bound in contract for thirty years. If the latter had been the intention it would have been natural to express it. The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company or corporation to supply water, "be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation. . . ." There is no explicit provision for repetitions of the power—none declaring the power conferred a continuing one. Who now doubts that it is? If rights were claimed and were pleading for a different interpretation we might have to listen to them, but now undisturbed by them we yield without resistance to that meaning which the subject-matter demands in the absence of negativing words.

Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks "*at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.*" The words, "*fixed by ordinance,*" may

be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted, which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.

It is also urged by plaintiff that the ordinance of February 10, 1896, deprives the plaintiff of its property without due process of law. The grounds of this contention are that (1) by the statute of June 6, 1891, none of the circumstances which, it is claimed, constitute a rate just and reasonable, are required to be considered by the authorities of cities nor is previous notice required to be given to the parties furnishing water; (2) establishing rates is a legislative, not a judicial act, and that, therefore, the power to review and determine them given by the statute to the circuit court is void; (3) the cities, towns and villages of the State are made judges in their own cases.

The first ground is answered by *San Diego Land Co.* v. *National City*, (174 U. S. 750,) and we may say there is no question of the reasonableness of the rates. It was alleged in the pleas of the defendant that the rates of the ordinance of June, 1882, were unreasonable when established. This was conceded by the demurrer. It was alleged in the pleas that they continued unreasonable. This was conceded by the demurrer. It was also alleged that the rates established by the ordinance of February 10, 1896, were just and reasonable. This was also conceded. The allegations, therefore, must be accepted as true conclusions from investigation. And it was averred besides that "the plaintiff refused to treat" with a committee appointed by the city council, "and neglected to reduce or fix such rental and water rates so as to make them just, reasonable and fair."

Of the second ground it is only necessary to say that the statutes of 1872 gave to the city the power to fix the rates. It became a condition therefor of the privileges granted to plaintiff. The act of 1891 only repeated and emphasized the power.

The third ground urged why plaintiff is deprived of its property without due process of law is as abstract, as free from real grievance to plaintiff, as the other grounds. With what functions the circuit courts of the State may be invested may not be of Federal concern. It is also a matter of construction, in which we might be obliged to follow the State courts. The ground we are now reviewing seems not to have been presented to the Supreme Court of the State either in the case at bar or the cases referred to by it and upon which it based its opinion.

In *City of Danville* v. *Danville Water Co.*, *supra*, the provision of the statute was referred to, but not in such way that it can be confidently said

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that the power given to the circuit court was to only review the rates fixed by the city council and to determine them to be reasonable or unreasonable, or whether the court could go farther and fix rates. The former seems a natural construction. But whether it is or not, the plaintiff has yet no reviewable grievance. No power has been attempted to be exercised by the circuit court against the plaintiff and no judicial remedy has been denied it.

*Judgment affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*

# Supreme Court of the United States.

No. 348.—October Term, 1900.

The Freeport Water Company, Plaintiff in Error, vs. The City of Freeport. } In error to the Supreme Court of the State of Illinois.

[March 25, 1901.]

Mr. Justice White, with whom concurs Mr. Justice Brewer, Mr. Justice Brown and Mr. Justice Peckham, dissenting.

The far-reaching consequences which must result from the principles upon which this case is decided, and the conflict between those principles and what I conceive to be previous well-settled rules of law, impel me to state the reasons for my dissent.

The legislature of Illinois, in 1872, passed a law entitled "An act to enable cities and villages to contract for a supply of water for public use, and to levy and collect a tax to pay for water supplied." The act in full is as follows:

"Sec. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years.

"Sec. 2. Any such city or village, so contracting, may levy and collect a tax on all taxable property within such city or village, to pay for the water so supplied."

This act was approved on April 9, 1872. (Public Laws of Illinois, 1871–1872, p. 271.)

At the same session, an elaborate law was passed entitled "An act to provide for the incorporation of cities and villages." Article X, under the heading "(Miscellaneous Provisions.)—Water.", in section 1, provided as follows:

"Sec. 1. The city council or board of trustees shall have power to provide for a supply of water by the boring or sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or waterworks, and to borrow money therefor, *and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years;* also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or waterworks."

This was followed, in subsections 2 and 3, by the granting of full power to municipal corporations, in the event they determined to construct their own waterworks, to acquire land, &c., to levy taxes, and to provide for the collection of water rates or assessments for the use of the water to be supplied to the inhabitants from the works to be constructed. This act was approved on April 10, 1872. (Public Laws of Illinois, 1871–1872, p. 259.)

At the same session an act was passed entitled "An act concerning corporations." It was in effect a general law regulating the organization of private corporations in the State of Illinois. Section 9 thereof, in part, reads as follows:

"SEC. 9. The general assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act. . . ."

This act was approved April 18,1872. (Public Laws of Illinois, 1871-1872, p. 299.)

None of the foregoing acts contained an emergency clause; and, hence, although approved on different dates, each act went into force on the same day, viz., July 1, 1872. (Constitution of 1870, Illinois, Art. IV, sec. 13; 1 Starr & C. Ann. Stat. 2d ed. p. 125.)

The defendant in error, the city of Freeport, a municipal corporation, on June 6, 1882, enacted an ordinance giving Nathan Shelton or his assigns the right of constructing, maintaining and operating waterworks for the term of thirty years from the first day of July, 1882, for the purpose of furnishing fire protection to and for the supply of said city of Freeport and the inhabitants thereof with water suitable for domestic and manufacturing purposes. The ordinance consisted of fourteen sections. It provided for a stand pipe, that the pumping machinery should possess a capacity of at least three million gallons of water in twenty-four hours, to be increased as the growth of the city and its needs required, and that not less than eight miles of mains, of specified dimensions and quality, should be laid for the distribution of water. Ample provision was also made for the extension of these mains by the water company, at its cost, upon the direction of the city government. The obligation was further imposed upon Shelton or his assigns to erect double nozzle fire hydrants at the rate of not less than ten to each mile of main pipe, whenever and wherever the city council should direct. Payment was to be made by the city for fire hydrants by an annual rental for the first one hundred of one hundred dollars each, for all said hydrants, over one hundred and up to one hundred and fifty, an annual rental of eighty dollars each, and for all said hydrants over one hundred and fifty, an annual rental of fifty dollars each. It was expressly provided, in section 8 of the ordinance that the hydrant rentals "shall continue during the full term specified in this ordinance, unless said

city shall sooner become the owner of said waterworks as hereinbefore provided, in which event said rental shall cease." By section 6 the city reserved to itself the right to acquire the waterworks by purchase at the expiration of thirty years from July 1, 1882, the valuation of the property to be determined as provided in the section.

The ordinance contained provisions for the use of water "free of charge from the hydrants on streets curbed and guttered, for the purpose of washing and flushing the gutters, and from any hydrant for the purpose of flushing any and all sewers in said city whenever the city council shall deem it necessary for sanitary purposes, upon giving notice to the person in charge of said waterworks." It was also provided that "the city shall have water free of charge for the use of the fire department, and for furnishing the city hall and the offices occupied for city purposes, for all public schools of the city, for all churches, and for four public fountains for drinking only, and one fountain in the public square or park should the city erect the same." Full specifications were contained in the ordinance as to the maximum charge to be made for water to be furnished individual consumers. In other words, the ordinance formulated a complete system, not only for the construction of the works, but for their operation during the time specified therein.

It was provided that the ordinance should become a binding contract upon its acceptance in writing by Shelton within a stated [illegible], and when so accepted its provisions should not be changed, altered or amended in any way without the consent of both parties thereto or their successors or assigns.

On June 27, 1872, within the time limited, Shelton filed his written acceptance of the contract. In the following August he assigned all his rights to the plaintiff in error, a corporation organized under the provisions of the general statute relating to private corporations, approved April 18, 1872, above referred to. The assignment was recognized by the municipality, and it is unquestioned that the works were constructed in accordance with the contract, and that all obligations which it imposed were discharged by the company to the satisfaction of the municipality.

Up to January 1, 1896, under the contract, one hundred and twenty-one hydrants were placed in position, and up to that date the annual rental as provided in the contract was regularly paid by the municipality.

In 1891 an act was passed by the legislature of the State of Illinois entitled "An act to enable cities, towns and villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof." Briefly stated, this act, as its title indicated, empowered municipal corporations to prescribe by ordinance "maximum rates and charges for the supply of water

furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable." The act moreover provided that the reasonableness of the rates prescribed by the municipality might be tested by proceedings before a designated court.

Availing itself of the power conferred by this statute, the city of Freeport on February 11, 1896, passed an ordinance reducing the rates stipulated to be paid under the contract of 1882. It is necessary, however, only to consider, for the purposes of this case, the reduction made on the contract price for the public hydrants. At the reduction they were to be paid for annually at the uniform rate of fifty dollars each. Whilst thus seeking to reduce the sum which the city was to pay for the hydrants, the ordinance in effect retained all the contract obligations for the benefit of the city resting upon the water company, among them being the duty to lay additional mains as directed and to furnish free water for schools, churches and other purposes. The city refusing to pay any longer for the hydrants at the original contract price, an action was instituted to recover an amount asserted to be then due under the contract. Without stating the form of pleadings, it suffices to say that on the one hand the right of the water company to recover according to the rates fixed by the original contract was asserted and on the other the obligation of the city to pay only at the reduced rates was alleged. It was expressly charged in the pleadings on behalf of the water company that the enforcement of the ordinance reducing the rates would be an impairment of the obligations of the contract, and hence a violation of the contract clause of the Constitution of the United States.

The case was ultimately taken to the Supreme Court of Illinois, and, upon the authority of the analogous case of *City of Danville* v. *Danville Water Company,* (178 Ill. 299,) judgment went in favor of the city and against the water company. (186 Ill. 179.) The opinion of the court in the Danville case was not unanimous, three of the seven jndges dissenting. Without attempting to reproduce in its details the reasoning by which the court reached its conclusion, it seems to me that all the views expressed are embodied in the following propositions:

That the fixing of water rates was a public attribute, which from its nature was incapable of being alienated or restrained by the obligations of a contract, even although express authority to do so was conferred by the legislature on the municipality. That even if this was not the case, to contract for rates to be paid for a definite term required authority of the legislature, and that no such grant to the municipality had been conferred in this case, because, albeit, the legislative acts gave power to contract for a definite time for a supply of water, this did not give the right to fix the rates to be paid for the water during the time for which the municipality

was authorized to contract; the argument being that the power to contract for a definite time is one thing and the fixing of the rates for the same time for the water contracted for is another and different thing. That even under the hypothesis that the power to contract for a definite time included the authority to fix the rates for such time, the reservation found in the general private incorporation law operated to confer upon the legislature the right to change the rates, because the contract, although originally made by the city with an individual, had been assigned to the defendant, a private corporation organized under the general private incorporation law.

These propositions practically embrace all but one of the contentions urged in the argument at bar, and their consideration will therefore substantially dispose of the controversy, except in the particular above referred to, which we shall separately notice before concluding. Inverting the order in which they have been stated, I come to consider their correctness. In logical sequence the questions which arise are these: Was there power in the legislature to confer upon the municipality authority to contract for water for public use and fix by contract the rates to be paid by the city for a stated period? If so, was such power conferred upon the municipality, and did it contract under it? If it did so, was the contract to that effect taken out of the protection of the contract clause of the Constitution of the United States by reason of the reservations contained in the general private incorporation law under which the water company was organized?

It is not even intimated in the opinion below that there was any express limitation in the constitution of the State of Illinois restricting the power of the legislature to authorize a municipality to contract for water for public use for a fixed period and to agree upon the rates to be paid therefor for such time. That in the absence of such restriction the legislature of a State may contract, by statute, or may empower a municipality to contract for water for public use for a stated period and fix the rates to be paid during such term for the same, and that such contract if made is protected from impairment by the Constitution of the United States, is no longer an open question. (*New Orleans Waterworks Company* v. *Rivers*, (1885) 115 U. S. 647.)

In that case the exclusive right granted was to continue for fifty years, and the act which it was held constituted a contract stipulated for the furnishing of a supply of water for public use during the continuance of the contract, "in consideration whereof the franchises and property of the company, used in accordance with its charter, were exempted from taxation, State, municipal and parochial." (p. 677.) After observing that the case before the court was controlled by the decision in *New Orleans Gas Company* v. *Louisiana Gas Company*, (115 U. S. 650,) the court, speaking through Mr. Justice Harlan, said (p. 680):

"The two are not to be distinguished upon principle; for, if it was competent for the State, before the adoption of her present constitution, as we have held it was, to provide for supplying the city of New Orleans and its people with illuminating gas by means of pipes, mains and conduits placed at the cost of a private corporation, in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for like use in the same city."

In the Gas Company case, beginning at page 660, the court considered and held untenable the contention "that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects." After reviewing various decisions bearing upon this feature of the case, the court said (p. 664):

"Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. (*Asylum* v. *New Orleans*, 105 U. S. 362, 368; *Home of the Friendless*, 8 Wall. 430; *New Jersey* v. *Wilson*, 7 Cranch, 164, 166; *State Bank of Ohio* v. *Knoop*, 16 How. 363, 376; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Wilmington Railroad* v. *Reid*, 13 Wall. 264, 266; *Humphrey* v. *Pegues*, 16 Wall. 244, 248–9; *Farrington* v. *Tennessee*, 95 U. S. 679, 689.)"

The doctrine of the cases just cited was applied in *St. Tammany Waterworks* v. *New Orleans Waterworks*, (120 U. S. 64.) It was also recognized and applied in *Walla Walla* v. *Walla Walla Water Co.*, (172 U. S. 7, 9.) In that case the court held valid a stipulation contained in a contract with the water company by which the city of Walla Walla bound itself not to erect waterworks during the stipulated life of a contract, viz., twenty-five years. Speaking of the earlier decisions to which we have above referred, the court, speaking through Mr. Justice Brown, said (p. 9):

"It is true that in these cases the franchise was granted directly by the State legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the Supreme Court of Ohio in *State* (*Atty. Gen.*) v. *Cincinnati Gaslight & Coke Co.*, (18 Ohio St. 262, 293): 'And, assuming that such a power' (granting franchises to establish gas works) 'may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation clearly invested, for police purposes, with the necessary authority.' This case is directly in line with

those above cited. See also *Wright* v. *Nagle*, (101 U. S. 791; *Hamilton Gaslight & Coke Co.* v. *Hamilton City*, (146 U. S. 258, 266;) *Bacon* v. *Texas*, (163 U. S. 207, 216;) *New Orleans Waterworks Co.* v. *New Orleans*, (164 U. S. 471.)"

"Where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

That a city if authorized by the legislature, in the absence of limitations in the State constitution on the legislative power, could validly stipulate in a contract for a supply of water that the existing rates should not be *reduced* by the municipality during the contract period, was expressly adjudged in the recent case of *Los Angeles* v. *Los Angeles City Water-works Co.*, (1900) 177 U. S. 558. Indeed, in that case, at the time the contract was made, the city was without authority to make it, but inasmuch as subsequently its action had been ratified by legislative enactment the effect of such ratification was held to be equivalent to a prior original grant. But I need not further pursue this aspect of the case, since, as I understand the opinion of the court, it does not sanction the theory adopted by tho Supreme Court of Illinois on this subject, and hence does not therefore in terms overrule the principle so firmly settled by the previous decisions of this court that the subject matter of a water supply may be contracted for a definite time, and that when so contracted for the obligations of the contract are protected from impairment by the Constitution of the United States.

That in the present case some authority was delegated by the legislature to the municipality to contract for water is unquestioned, and it is also undisputed that under the right thus conferred the municipality acted in making the contract which is now in controversy. The issue which then arises is simply this, Did the authority conferred by the legislature upon the municipality authorize it to contract, and in doing so to fix the rates to be paid for such supply during the time stated? Of course, an answer to this question involves an analysis of the statutes of Illinois under which the authority to make the asserted contract arises.

Before approaching the text of the statutes it is well to state the scope of the duty which devolves upon this court in determining whether there was a contract and the principles which must control in doing so. It is elementary that where a contract is asserted to have been impaired by subsequent State legislation, this court is constrained to form an independent judgment as to the existence of the contract and its terms. It is equally true that where the contract originates from a State statute, if, in the exercise of an independent judgment, the existence or nature of the contract becomes balanced in doubt, such doubt will be resolved in favor of the construction given to the State statute by the court of last resort of the State.

But this qualification is not a limitation upon the duty to form an independent judgment, and does not imply that because the statute has been construed against the contract by the State court, therefore the matter is "balanced in doubt." If the rule did so imply, it would follow that in every case where a right arose from a State statute, and the court below held there was no contract, the review of that question in this court would be wholly nugatory, since the decision below would engender the doubt, and where doubt arose the decision of the State court would have to be followed. The rule then to be applied when the matter is balanced in doubt is this and nothing more, that if in using its independent judgment, as it is its duty to do, a serious doubt arises in the mind of the court, then the interpretation by the State court, acting upon a serious doubt created by the exercise of independent judgment, will cause such judgment to preponderate in favor of the construction given by the State court to its own statute. (*Board of Liquidation* v. *Louisiana*, 179 U. S. 622, 638.)

It is unquestioned also that where a right asserted if enforced will put a contractual limitation upon the power of the lawmaking authority of a State, presumably to be exercised for the public benefit, doubt is to be resolved in favor of the continued existence of the lawmaking power. In other words, that no contract limitation on the powers of government can be upheld by mere implication or sustained if there be doubt on the subject. The existence of such a contract limititation must arise clearly and by express intendment.

Bearing these principles in mind, I come to consider the legislative acts by which it is asserted the contract in question arose. Whilst it is quite clear to my mind that the powers conferred by the respective statutes were to be exerted under different circumstances and that the contract which is here in question came more especially within the scope of the act approved April 10, 1872, I shall not stop to discuss this view, since, whether the statutes be treated separately or together, they fully authorize the contract. Under this view I first approach the consideration of the act of April 9, 1872. Its language is that in all cities and villages where waterworks may hereafter be constructed, the city or village authorities "may contract . . . for a supply of water for public use for a period not exceeding thirty years." And the second section conferred upon a municipality so contracting power to levy taxes "to pay for the water so supplied." Clearly, authority is expressly conferred to contract for a supply of water for the period stated. The argument is that this right to contract for the water for the period of thirty years did not include the power to agree upon the sum to be paid for it for that period. In other words, the contention is that the right to contract for the purchase existed for the stated period without the power to fix the price which was an inseperable and necessary concomitant of the right itself. This inevitably follows, since the contract for the supply for a fixed

time and the payment to be made for it are one and each the correlative of the other. That the statute contemplated that the contract should include the price to be paid is manifestly the result of the second section, which confers upon the municipality the right to raise by taxation the money to pay the sum stipulated. Upon the hypothesis that the power to contract for the supply for thirty years did not include the agreement to pay for the supply during the stated period, the second section of the act would become wholly superfluous. Indeed, the theory of construction which excludes the rates from the power to contract for the period specified would render the whole act meaningless. Undoubtedly, if waterworks existed and use was made of the streets of the city by the owner of the works, in the absence of contract the power to compel the furnishing of water at just and reasonable rates would exist by operation of law. It follows that the statute should not be construed as merely authorizing the doing of that which could have been done without its passage, but must in reason be held to have empowered the obtaining of a water supply and facilities by way of extension of the water system, free water for certain public purposes and fire protection and all the other incidents to such contract, for the period named and at the rates to be agreed upon for such period. The same view obtains from considering the provisions of the first section of Article X of the act of April 10, 1872. By this section municipal authorities were authorized to provide for a supply of water by constructing municipal waterworks, or to accomplish the same purpose by authorizing "any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance and for a period not exceeding thirty years." There was here an express delegation of authority to municipalities if they did not wish to assume the burden of constructing their own waterworks, to contract with an individual or private corporation to construct and maintain them at "*such rates as may be fixed by ordinance and for a period not exceeding thirty years.*" My mind fails to perceive how language could more directly and positively confer the authority to contract for the supply and agree as to the rates to be paid therefor for a period of thirty years. Adopting the most technical rules of construction, I do not understand how the words "at such rates as may be fixed by ordinance and for a period not exceeding thirty years" can be construed as relating to the construction and maintenance of the works for that period and not to the sum to be paid for the supply for the same length of time. The view adopted by the court below was that the words "at such rates as may be fixed by ordinance" can be taken out of the text and be treated as following and not as preceding the words "and for a period not exceeding thirty years." But this, as I understand it, instead of construing the statute, would be the equivalent of writing a new one. Obviously, whilst the statute authorized a contract for a supply and the rates to be paid therefor,

it contemplated that the rates must in the nature of things be fixed by the passage of an ordinance to be embodied in the contract, and therefore the words "may be fixed by ordinance" were inserted. In other words, in order to insure under the contract the rates to be agreed upon, it provided that by ordinance these rates should be fixed for the designated period. Both laws, as I have stated, went into effect on the same day, but whilst relating to cognate subjects, contemplated the exercise of the power conferred as a result of somewhat different conditions. The one, the law approved April 9, had in view a contract for a water supply to be made where waterworks were established, and conferred the authority to contract for such supply under such circumstances and to fix the price to be paid for the supply for the contract term specified in the statute. The other, the law approved April 10, 1872, authorized a contract *to procure the construction of waterworks*, and also in doing so to fix the rates for the definite period which that statute likewise enumerated. To construe the words "*may be fixed by ordinance and for a period not exceeding thirty years*," as found in the statute as a legislative prohibition on the municipality to fix rates for the period stated in the law, is but to say that the power to contract and fix the rates for the definite time was at one and the same identical moment both given and prohibited.

But the construction adopted below and now maintained by the court, as I understand it, leads yet further. As the words "may be fixed by ordinance and for a period not exceeding thirty years" are not found in the law authorizing a contract for water supply where waterworks were established when the agreement was made, they cannot be applied to such a contract. The following, then, is the inevitable result of the construction given to the statutes. The power to contract and fix rates for a definite time was conferred in the case where such a contract was made with an established water company. This power, however, was not given but was expressly prohibited where the purpose of the contract was to procure the building of waterworks and the purchase of a supply of water to be furnished from the works when constructed. This is but to say that where municipalities were legally entitled to secure the water supply without the necessity for a contract and at reasonable rates, they were unauthorized to contract for a definite time and at rates to be fixed for that period. But in the case where municipalities had no such power (for they could not, of course, compel an individual or corporation to undertake the expense of erecting waterworks) the power to fix rates for a definite period was absolutely prohibited. In other words, the power was conferred to contract for the supply and fix the price for a definite time where it was not at all needed, and it was absolutely forbidden in the case where in the nature of things such a power was essential. Considering the statutes separately, no doubt whatever then arises in my mind as to their import.

When they are construed in *pari materia* this conclusion becomes to me an absolute conviction. This must be the result, since it is impossible, in reason, to hold that if the meaning of each statute is plain when considered separately the significance of each disappears when they are considered together.

The contract as executed, beyond peradventure, expressly fixed the rates for the term for which it was agreed the supply should be furnished. It imposed, moreover, upon the water company duties to construct and extend the works, which could only arise from contract, and which cannot reasonably be assumed to have been entered into but upon the basis of an agreed compensation. The obligations on the water company were not simply to furnish a supply of water in accordance with the capacity of the plant existing at the inception of the contract, or provided for therein, but that the company came under the duty of largely extending its plant at the discretion of the municipality during the statutory period covered by the contract. The company, moreover, agreed to furnish a large volume of water during the same period without charge. It is inconceivable that all these obligations would have been assumed upon the hypothesis that they were to be performed during the thirty years without any previous understanding or agreement as to the payment to be made during the same time.

Various authorities are cited in the opinion of the court below, and were referred to in argument, upon the theory that they support the contention that where authority is given to contract for a supply of water for a fixed period, this power to contract does not as a necessary incident import authority to also agree upon the rates for the same period. In other words, the authorities cited, it is contended, separate the inseparable.

All the authorities cited are excerpted in the margin.* I do not pause to analyze them, contenting myself with the statement that not a single one of them, except the decision of a lower appellate court in Illinois, rendered subsequent to the execution of the contract here considered, have any relation to the proposition which they are cited to maintain. They all proceed upon the theory that where authority is given to a municipality or official board to contract, *without any specification of the time*, the municipality or board can contract only for a reasonable period, to be determined usually by the tenure of office of the official board. That is, *in the absence of a specification of time in the statute*, a limit is to be

*City of Carlyle *v.* Carlyle Water, Light & Power Co., 52 Ill. App. 577; East St. Louis *v.* East St. Louis Gaslight & Coke Co., 98 Ill. 415; Millikin *v.* County of Edgar, 142 Ill. 528; Gale *v.* Village of Kalamazoo, 23 Mich. 354; Des Moines Waterworks Co. *v.* City of Des Moines, 95 Iowa, 357; Waterworks *v.* Schottler, 110 U. S. 347; State *v.* Columbus Gaslight & Coke Co., 34 Ohio St. 572; Zanesville *v.* Gaslight Co., 47 Ohio St. 1; Greenh. Pub. Pol. p. 317; Cooley Const. Lim. p. 206; 1 Dill. Mun. Corp. sec. 443.

implied resulting from the nature of the functions of the officials by whom the contract is made, I cannot conceive upon what principle these authorities are held to control a case where in the statute conferring authority *the time was expressly fixed.* Indeed, the decisions in Illinois, (among them not only the cases cited below, but others which were referred to in those cases,) which are now relied upon to sustain the proposition that a power to contract for a supply of a commodity or the services of an individual does not include the authority to agree upon the compensation to be paid, actually refute the contention which it is alleged they sustain. Thus, in *Millikin* v. *County of Edgar*, (142 Ill. 528;) *Davis* v. *School Directors*, (92 Ill. 294,) and *Stevenson* v. *School Directors*, (87 Ill. 255,) though it was held, from a consideration of co-related statutes, that where authority was conferred upon statutory boards to employ individuals to render public services, but no period was mentioned in the statute for the duration of such hiring, a contract of hiring might only lawfully be made for the current year, it was conceded that the power existed as a necessary result of the right to contract, to fix the compensation for such period. These cases demonstrate the unsoundness of the contention, here asserted, that the contract under consideration should be dismembered by disassociating the right to fix rates from the authority to contract for the period authorized by statute, and they also, in my opinion, refute the assumption that because the statute gave express power to fix rates by ordinance, that thereby there did or could arise a limitation on the authority to contract for the price for the term for which the contract was authorized.

The contract in its entirety being then valid, the question which arises is, Did the power to destroy the contract arise from the reservation contained in the general private incorporation law?

In considering this question it must be borne in mind that there was no reservation whatever of the power to repeal, alter or amend contained in the law regulating public corporations, nor was such a reservation found in the constitution of the State. The power conferred upon municipalities to contract for a supply of water or for the construction of waterworks authorized them to contract with individuals as well as corporations, and in this particular instance the contract was made with an individual. It is clear, then, that any reservation in the private incorporation act would not have acted upon the contract for the supply of water if that contract had remained in the hands of an individual. To hold, then, that the provision of the ninth section of the law regulating private corporations, which reserved to the general assembly the power to prescribe such regulations and provisions as it might deem advisable as to such corporations, retained the power to abrogate a contract like the one here involved, would import that, although there was no reservation whatever to abrogate or change the contracts as to water supply, made by a municipal corporation, that the private incorporation law was intended to deprive private corporations

of the power to contract with municipal corporations as to water supply. That is to say, that public corporations were fully authorized to make irrevocable contracts, but such agreements became revocable when a private corporation was the other contracting party. But, aside from these considerations, the views of the contract, which I have already expressed, to my mind clearly demonstrate the inapplicability of the reservation relied upon. The reservation, as I have shown, went into effect on the same day as did the laws which expressly and specifically authorized the making, by municipal corporations, of a contract for a supply of water for a designated period *with individuals* or corporations. The statutes having gone into effect upon the same day, it would be beyond reason to construe the mere reservation of the legislative right to regulate private corporations as abrogating and destroying the express legislative authority to contract for a supply of water for a specified and definite period. To do so would be, by a mere implication, in effect to repeal and set aside the express authority conferred by the statutes, and would amount to holding that the authority had been conferred in the one breath and had been retracted in the other.

Indeed, the statute of 1891 which conferred the power to regulate water rates—under the authority of which the ordinance here complained of reducing the rates, was passed—shows on its face that it was not enacted under the authority to regulate private corporations but upon the supposed existence in the legislature of a common law right to fix rates, any contract to the contrary notwithstanding. This will become manifest when it is observed that the statute in question authorized municipalities to fix the rates for the supply of water, whether furnished by *private individuals* or corporations.

Although no reference was made to it in the opinion below, it is suggested in argument that as there was a provision in the constitution of the State of Illinois forbidding a grant of exclusive privileges, therefore the contract here considered was void because, it is asserted, such contract expressly conferred an exclusive right and privilege. It is however settled that the mere making of a contract for a water supply for a definite time and the fixing of rates for such time, accompanied with an obligation that the municipality itself would not construct waterworks for such period, does not amount to a grant of an exclusive privilege. (*Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 14, 17.) This being beyond question, it clearly follows that even upon the hypothesis that the contract in this case contained an express or implied stipulation that the city would not grant to any one else the right to use the streets of the city for the purposes of a waterwork system during the life of the contract, the stipulation for such exclusive right and not the contract would come within the inhibition of the provision of the constitution. We say this *arguendo* only, as the con-

troversy here presented involves the validity of the contract in so far as it affected the supply for public use and fixed the rates of such supply during the period stated.

In my opinion, the contract having been expressly authorized for a definite period, the rates agreed upon could not, during the term of the contract, be changed without violating the contract clause of the Constitution of the United States; and I therefore dissent from the judgment holding otherwise.

True copy.

Test:

*Clerk Supreme Court, U. S.*

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